Jurisdictional Statement

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IN THE

Supreme Court Of The United States

No. _____

October Term, 1981

Arkansas Electric Cooperative Corporation, ... *Appellant*

V.

Arkansas Public Service Commission, ... *Appellee*

ON APPEAL FROM THE SUPREME COURT OF ARKANSAS

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether the Arkansas Public Service Commission's assertion of authority over Arkansas Electric Cooperative Corporation's wholesale rates is a constitutionally valid application of Ark. Stat. Ann. §73-201, et. seq. (which grants the Arkansas Public Service Commission jurisdiction to regulate utility rates generally), in light of the Commerce Clause of Article I, §8 of the United States Constitution and the holdings in *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Company*, 273 U.S. 83, 47 S.Ct. 294, 71 L.Ed. 549 (1927), and in *Federal Power Commission v. Southern California Edison Company*, 376 U.S. 205, 84 S.Ct. 644, 11 L.Ed.2d 638 (1964).

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JURISDICTIONAL STATEMENT

OPINION BELOW

The majority and dissenting opinions of the Supreme Court of Arkansas, which appear in the appendix, at pages A-1 and A-6, *infra*, are reported at 273 Ark. 170, 618 S.W.2d 151 (1981). The order of the PSC dated November 2, 1979, which is not reported, appears in the appendix, at page A-11, *infra*.

JURISDICTION

Arkansas Electric Cooperative Corporation ("AECC"), appellant, appeals from the final judgment of the Supreme Court of Arkansas, holding that the Arkansas Public Service Commission ("PSC") had the authority under Arkansas statutes to exercise jurisdiction over AECC's wholesale rates, and that the PSC's authority was neither preempted by federal law nor prohibited by the commerce clause of the United States Constitution.

The judgment of the Supreme Court of Arkansas upholding the PSC's assertion of jurisdiction was delivered on June 22, 1981. See appendix, page A-1, *infra*. A timely petition for rehearing was entertained and denied on July 20, 1981. See appendix page A-25, *infra*. A notice of appeal to this Court was duly filed in the Supreme Court of Arkansas on October 5, 1981. See appendix page A-26, *infra*.

This appeal is being docketed in this Court within ninety days from the denial of rehearing below. The jurisdiction of this court is invoked under 28 U.S.C. §1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES

Article I, §8, United States Constitution:

> The Congress shall have power . . . To regulate commerce with foreign nations and among the several states . . .

Ark. Stat. Ann. §73-202a:

> The Arkansas Public Service Commission is hereby vested with the sole and exclusive jurisdiction and authority to determine the rates to be charged for each kind

of product or service to be furnished or rendered by electric, gas, telephone, or sewer public utilities in Arkansas. The term "electric, gas, telephone, or sewer public utilities" when used in this Act includes persons and corporations, or their lessees, trustees, and receivers, now or hereafter owning or operating in this State, equipment or facilities for producing, generating, transmitting, delivering, furnishing or collecting electricity, sewage or gas for the production of light, heat or power or for the collection of sewage or other waste, or conveying or transmitting messages or communications by telephone or telegraph, to, or for, the public for compensation, or producing, generating, transmitting, delivering or furnishing electricity or gas, to any other person or corporation for resale or distribution to, or for, the public for compensation or for operating or maintaining sewer facility. . .

Ark. Stat. Ann. §73-202.1:

Electric Cooperative Corporations generating, manufacturing, purchasing, acquiring, transmitting, distributing, selling, furnishing and disposing of electric power and energy in this State pursuant to Act 342 of 1937 as amended shall be subject to the general jurisdiction of the Arkansas Public Service Commission in the same manner and to the same extent as now or hereafter, provided by law for the regualtion, supervision or control of public utilities, except as provided herein.

Ark. Stat. Ann. §73-203(a):

Neither this Act, nor any provisions thereof, shall apply or be construed to apply to commerce with foreign nations or commerce among the several states of the

Union, except insofar as the same may be permitted under provisions of the Constitution of the United States and the Acts of Congress.

STATEMENT OF THE CASE

AECC is an electric cooperative corporation engaged exclusively in the generation, transmission and sale at wholesale of electric energy to its members, who are seventeen distribution (or "retail") electric cooperative corporations. Each member cooperative designates two persons to serve on the board of directors of AECC. The member cooperatives purchase power from AECC and then re-sell it, at retail, to their members, the ultimate consumers of the power. The member cooperatives are subject to the jurisdiction of the PSC and rates charged by the member cooperatives to their retail consumers are regulated by the PSC.

AECC has two sources for the power which it sells at wholesale to its member cooperatives: (1) its four generating plants, three wholly owned and one partially owned; and (2) purchases of power from Southwestern Electric Power Company ("SWEPCO"), Southwestern Power Administration ("SPA"), and Arkansas Power & Light Company ("AP&L"). AP&L is one of five wholly owned utilities of Middle South Utilities; the other four operate outside Arkansas.

Under the agreements existing between AECC and SPA, and AECC and AP&L, AECC both obtains energy from and sells energy to those organizations; both are connected to multi-state grids, so that power obtained from them or power delivered to them may pass across state lines.

The nature of the electric utility industry is that the quantity of energy delivered to AECC at a given point may be precisely measured; however, if that energy is being supplied from a multi-state grid, involving several possible sources of generation, the generating source of the particular energy cannot be ascertained. The reverse would

be true with respect to the ultimate consumption of energy delivered by AECC to a multi-state grid; it might be transmitted within or outside the state of Arkansas and consumed within or outside the state of Arkansas, but it would be impossible to determine which.

The business and affairs of AECC are managed by a board of directors comprising thirty-four person, two designated by each of the seventeen retail or member cooperatives served by AECC. This board of member-designated directors determines the rates charged to the member cooperatives. The rates do not vary, but are uniform for all member cooperatives.

AECC's sales of power are all at wholesale to its member cooperatives or other distributors of electric energy; it makes no sales at retail to any ultimate consumer of power.

On December 11, 1978, the Arkansas Public Service Commission issued an order giving notice that it proposed to consider whether it had jurisdiction over the rates and charges made by AECC for electricity furnished to its member cooperatives, and scheduled a hearing on this proposal. On January 8, 1979, AECC filed its "Comments", (appendix, p. A-27) wherein it stated:

> "The interstate transmission and sale of electricity at wholesale to local distribution cooperatives is not subject to state control of rates under the decisions of the United States Supreme Court in *Public Utilities Commission of Rhode Island v. Attleboro*, 273 U.S. 83 (1927), *FPC. v. Southern California Edison Company*, 376 U.S. 205 (1964) (the Colton case)."

Following a public hearing, the PSC entered its order dated November 2, 1979 (appendix, p. A-11), in which it acknowledged that some of AECC's purchased power originated outside Arkansas, and that some of the power it delivers to those suppliers is by them transmitted beyond

the state of Arkansas; that AECC contended that its rates were beyond its jurisdiction because of federal law; and that it disagreed with that position, ordering AECC to regard itself as subject to the jurisdiction of the PSC.

When AECC applied for rehearing of the PSC order, and when it petitioned the Pulaski County Circuit Court to review the PSC's order, it specifically asserted that the PSC had erred as a matter of law in exercising jurisdiction over wholesale rates, since the federal government had been given authority to regulate wholesale rates in all cases except those which Congress had made explicitly subject to regulation by the states (appendix, pages A-28, A-29).

Appellant reiterated its commerce clause arguments before the Arkansas Supreme Court, both in its appellee's brief, and in its petition for rehearing. The Arkansas Supreme Court denied the petition for rehearing without opinion; however, it specifically held in its majority opinion that the PSC had authority to exercise jurisdiction, over the rates in question, and that that authority "is neither preempted by any federal law nor prohibited by the Commerce Clause of the United States Constitution." See appendix, page A-2, *infra*.

THE QUESTION IS SUBSTANTIAL

The issue of what may be regulated by the states, and what is reserved to the Congress of the United States by the Commerce Clause is a matter of substantial national importance. In its decision below, the Arkansas Supreme Court failed to properly interpret and apply controlling decisions of this Court, and has rendered a decision in direct conflict with holdings of this court.

Two decisions of this court provide the legal framework applicable to this case. *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Company*, 273 U.S. 83, 47 S.Ct. 294, 71 L.Ed. 549 (1927), held

that the Commerce Clause prohibited the state of Rhode Island from regulating the rates at which a Rhode Island Company sold electricity to a Massachusetts Corporation, because such a sale is in interstate commerce. Because of these constitutional limitations on state power to regulate, Congress passed the Federal Power Act in 1935 and the Natural Gas Act in 1938.

Then, in *Federal Power Commission v. Southern California Edison Company*, 376 U.S. 205, 84 S.Ct. 644, 11 L.Ed.2d 638 (1964), usually referred to as "the Colton case," the Court found substantial evidence to support a Federal Power Commission ("FPC") finding that sales of electricity by Southern California Edison Company ("Edison") to the City of Colton, California were sales of electric energy "at wholesale in interstate commerce . . . ", 376 U.S. 205, 208; 84 S.Ct. 644, 647. This finding was based on evidence that some of the energy sold by Edison to Colton had been generated outside California. The facts found by the PSC in the instant case are almost identical.

Two petitions for certiorari were granted and the Ninth Circuit Court of Appeals was unanimously reversed in the *Colton* case. There the question was Federal Power Commission ("FPC") authority to regulate sales by Southern California Edison Company ("Edison") to the City of Colton ("Colton"), but the issue was precisely the same: May the state regulate the sale, or is that regulation reserved to Congress by the Commerce Clause?

In *Colton*, the Court had to determine the reach of FPC jurisdiction, given the language of §201(a) of the Federal Power Act, which provided, in part:

> "It is hereby declared that * * * Federal regulation of * * * the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States."

The Court reviewed the line of decisions beginning with *Public Utilities Commission for State of Kansas v. Landon*, 249 U.S. 236, 39 S.Ct. 268, 63 L.Ed. 577 (1918), and continuing through *Missouri ex Rel. Barrett v. Kansas Natural Gas Company*, 265 U.S. 298, 44 S.Ct. 544, 68 L.Ed. 1027 (1923), and *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Company*, 273 U.S. 83, 47 S.Ct. 294, 71 L.Ed. 549 (1927). The court noted that:

> "Congress undertook federal regulation through the Federal Power Act in 1935 and the Natural Gas Act in 1938. The premise was that constitutional limitations upon state regulatory power made federal regulation essential if major aspects of interstate transmission and the sale were not to go unregulated." *Federal Power Commission v. Southern California Edison Company*, 376 U.S. 205, 213, 84 S.Ct. 644, 650.

The Court then turned to its decision in *Illinois Natural Gas Company v. Central Illinois Public Service Company*, 314 U.S. 498, 62 S.Ct. 384, 86 L.Ed. 371 (1941), and concluded, as follows:

> " . . . But the Court held that Congress, rather than adopting this flexible approach, which was applied by the Court of Appeals in the instant case, 'undertook to regulate * * * without the necessity, where Congress has not acted, of drawing the precise line between state and federal power by the litigation of particular cases.' Id., 314 U.S. at 506-507, 62 S.Ct., at 388, 86 L.Ed. 371. What Congress did was to adopt the test developed in the Attleboro line which denied state power to regulate a sale 'at wholesale to local distributing companies' and allowed state regulation of a sale at 'local retail rates to ultimate consumers.' 314 U.S., at 504, 62 S.Ct., at 386, 86 L.Ed. 371." "This conclusion has been consistently reaffirmed in subsequent cases. In *Panhandle Eastern Pipeline Company v. Public Service Commission*, 332 U.S. 507, 68 S.Ct. 190, 92

> L.Ed. 128, which considered the reach of §1 (b) of the Natural Gas Act, the Court said that '[t]he line of the statute was thus clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive uses. No exceptions were made in either category for particular uses, quantities or otherwise.' 332 U.S., at 517, 68 S.Ct., at 195, 92 L.Ed. 128." *Federal Power Commission v. Southern California Edison Company*, 376 U.S. 205, 214-215, 84 S.Ct. 644, 650-651, 11 L.Ed.2d 638.

Finally, the court declared in unequivocal terms the separation between federal power to regulate and state power to regulate:

> "In short, our decisions have squarely rejected the view of the Court of Appeals that the scope of FPC jurisdiction over interstate sales of gas or electricity at wholesale is to be determined by a case-by-case analysis of the impact of state regulation upon the national interest. Rather, Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary such case-by-case analysis." *Federal Power Commission v. Southern California Edison Company*, 376 U.S. 205, 215-216, 84 S.Ct. 644, 651, 11 L.Ed.2d 638.

While Edison was an investor-owned utility and not a cooperative, the similarity between its sales at issue in the *Colton* case and the sales of AECC at issue in this case are striking. Edison operated in central and southern California and sold energy only to customers located there. AECC is located in Arkansas and sells energy only to customers located or taking delivery in Arkansas.

Colton used some of the power purchased from Edison for municipal purposes, but resold the bulk of it to residential, commercial and industrial customers in its area. AECC's member cooperatives resell the bulk of the energy purchased from AECC to their members, the residential,

commercial and industrial customers who are the ultimate consumers of the power.

Most important the FPC in *Colton* found that out-of-state energy from Hoover Dam was included in the energy delivered by Edison to Colton, and that the "sale to Colton is a sale of electric energy at wholesale in interstate commerce . . . " Here, the PSC said, "We presume that some amount of AECC's purchased power originates outside the State and that some of the power it delivers to other suppliers is by them transmitted beyond this State."

Despite these findings of fact almost identical to those characterized by the Court in Colton as interstate commerce, the Arkansas Supreme Court concluded that the *Colton* case did not apply, reasoning that *Colton* did not involve a cooperative and was concerned with interpretation of the Federal Power Act. It should be noted that the Federal Power Act itself could conceivably be applicable to cooperatives such as AECC; the FPC has interpreted the act so that it does not so apply. But that interpretation is based on an exclusion in the act, and not on any theory that the act could not be constitutionally applied to cooperatives. *Dairyland Power Cooperative*, 67 PUR3d 340 (1967).

The Supreme Court of Arkansas, while purporting to distinguish the holding in *Colton*, has reached a directly contradictory result, holding that the PSC may regulate rates in transactions virtually identical to those held in *Colton* to be wholesale transactions in interstate commerce.

With the decision in *Colton*, sales of electric energy at wholesale, or to retailers for resale to ultimate consumers, were placed beyond question within the sphere of federal control and outside the sphere of state control. AECC sells only at wholesale, and some of the power it sells is generated outside the state of Arkansas. There is, therefore, no constitutionaily valid way for the state to regulate the transactions in question.

In order to insure uniformity of interpretation of the Commerce Clause, the court should reverse the Supreme Court of Arkansas and eliminate the conflict which the Supreme Court of Arkansas has now established between it and decisions of the Court.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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Appendix

APPENDIX

SUPREME COURT OF ARKANSAS

No. 80-313

Opinion Delivered June 22, 1981

ARKANSAS PUBLIC SERVICE COMMISSION,

Appellant,

Appeal from Pulaski County Circuit Court; Perry V. Whitmore, Judge.

V.

ARKANSAS ELECTRIC COOPERATIVE CORPORATION,

Appellee.

Reversed.

DARRELL HICKMAN, Associate Justice

In 1979 the Public Service Commission decided to exercise jurisdiction over the rates and charges of the Arkansas Electric Cooperative Corporation.

The hearing preceding the order and the issues on appeal form only one question, whether the Commission is attempting to regulate wholesale interstate sales of electricity. The Commission concluded that it was not and could, therefore, assume jurisdiction.

Arkansas Electric Cooperative Corporation was formed to serve its seventeen members who are all Arkansas electric cooperatives. The only Arkansas cooperative that is not a member is one located at Newport, Arkansas. The appellee corporation was formed by the seventeen cooperatives so that the customers of the

cooperatives could be better served: borrowing and purchasing power are more economical through a joint effort.

The appellee generates some of its electricity and buys the remainder from utility companies located in Arkansas. Apparently the appellee sells some of its electricity to these same utility companies when there is a surplus of energy. Other than those sales, all the power generated and bought by the appellee is sold to the seventeen Arkansas cooperatives. It is conceded that these cooperatives must buy the power and that the rate is determined by the appellee. It is not a negotiated rate and the rate is not regulated by any state or federal agency.

The PSC decided that it could exercise jurisdiction over those sales which were "essentially local." In its order the PSC said, "This Commission would not attempt to regulate the rate at which AECC purchases power in interstate commerce and that rate, of course, must act as a base for the price at which it resells that power to its members."

The corporation appealed the order to circuit court and the court reversed the Commission's decision. The court found that the sales of the corporation were wholesale sales in interstate commerce over which the PSC had no jurisdiction.

We find that the Commission had the authority by Arkansas statutes to exercise jurisdiction and that this authority is neither preempted by any federal law nor prohibited by the Commerce Clause of the United States Constitution.

The Arkansas statutes give the Commission the authority over public utilities and the appellee is such a utility. *See* Ark. Stat. Ann. §73-201, et seq. (Repl. 1979). There are no exceptions for regulating wholesale sales. Ark. Stat. Ann. §73-202 (a) (Repl. 1979).

The Commission concedes it cannot regulate wholesale sales in interstate commerce and contends that it has no intention of doing so. The appellee cites authority that the Commission's order will do just that.

The distinguishing features in this case are as follows: The appellee is an Arkansas corporation formed for the purpose of serving seventeen Arkansas cooperatives. While it may incidentally and from time to time buy or sell electricity that may cross a state line, that is not its purpose. The utility companies that it buys from and sells surplus electricity to do serve customers in other states. Those are Arkansas Power & Light Co., which is a part of Middle South Utilities, Southwest Electric Power Co., and Southwestern Power Administration.

But the Commission found:

> . . . AECC's business, indeed its very reason for existence, is the generation, purchase and transmission of electricity for and to its members, seventeen Arkansas electricity distribution co-operatives, who retail the electricity to their members in this State.

The Appellee cites several cases as authority for its position. They are all distinguishable. *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927) is not controlling because in that case a Rhode Island utility company had a wholesale customer in Massachusetts. The court found the regulation by Rhode Island was not local but essentially national. The Court prevented Rhode Island from setting the rate. The appellee in this case exists to serve seventeen Arkansas cooperatives; it sells to none in other states.

The case of *Federal Power Commission v. Southern California Edison Co.*, 376 U.S. 205 (1965) is not controlling because that case interpreted the Federal Power Act and

did not involve a cooperative. The Federal Power Commission took jurisdiction over wholesale rates charged by Edison, a California utility company to the city of Colton, which is also in California. A small amount of power sold by Edison originated in other states. This case does not control because it concerned an interpretation of the Federal Power Act. The Federal Power Commission has held that the Federal Power Act does not apply to cooperatives financed by the Rural Electrification Administration. *Re Dairyland Power Cooperative*, 67 PUR 3d 340 (1967). The appellee concedes that the Federal Power Commission has not attempted to regulate its rates.

Tri-State Generation & Transmission Association v. Public Service Commission, 412 F.2d 115 (10th Cir. 1969) is not controlling because of distinguishing facts. Cooperatives in three states, Colorado, Wyoming, and Nebraska, formed a corporation just like the appellee. The Circuit Court of Appeals found the Wyoming Public Service Commission had prevented the Wyoming cooperative from paying contractual obligations to Tri-State which imposed a burden on interstate commerce. The appellee consists of cooperatives only in Arkansas and there is no evidence of a burden on interstate commerce.

In *Missouri v. Kansas Natural Gas Co.*, 265 U.S. 98 (1924), Missouri sought to regulate a situation where power originating in Oklahoma passed through Kansas and was sold in Missouri. The Court held that the sale of this power was "an inseparable part of a transaction in Interstate Commerce—not local, but essentially national in character . . . " In distinguishing this case, the appellant Commission found:

> . . . [I]t seems to us that the rates and charges of AECC that could effectively be regulated by this Commission are for transactions essentially local in character. Unlike *Kansas Gas*, [*Missouri v. Kansas Natural Gas Co.*, 265 U.S. 98 (1924)] which sold in an open interstate market, AECC exists to serve its

members. Its transactions with them do not constitute "an unbroken chain, fundamentally interstate from beginning to end." Those transactions begin and end here in Arkansas. This service is hardly "of the character which require(s) general and uniform regulation of rates by Congressional action." Unlike the Narragansett Company, AECC does not serve customers in other states whose authorities might retaliate, to the detriment of interstate commerce. Unlike Rhode Island, this Commission does not seek to regulate, nor do we read our statutes as requiring us to regulate, interstate transactions of AECC, if there be any. If our regulation of rates charged to local customers has an "effect" unto interstate commerce, it can only be incidental, given a continuation of the present circumstances and policies of the company, which there is no reason not to expect. (That issue, however, can properly be dealt with only when and if it arises.) Nor does it matter that AECC's transactions with its members may be characterized as wholesale, for, as the Court said in *Attleboro*, [*Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927)] the test "is not the character of the general business . . . but whether the particular business which is regulated is essentially local or national in character." The particular business this Commission must regulate, between AECC and its members, is decidedly local, having its paramount impacts and consequences in Arkansas and having little or no relation to any other place.

The hearing did not delve into whether the appellee had been fair in its charges to its seventeen members. The only suggestion that the appellee's costs might be excessive was a reference to the fact that the appellee had thirty-four board members who met once a month and received $75.00 per diem for that meeting.

We find the appellant has the authority to take jurisdiction as it proposes and reverse the judgment of the circuit court.

Reversed.

Holt and Dudley, JJ, dissent.
George Rose Smith not participating.

SUPREME COURT OF ARKANSAS

NO. 80-313

Opinion Delivered June 22, 1981

ARKANSAS PUBLIC SERVICE COMMISSION,
APPELLANT

APPEAL FROM PULASKI CIRCUIT COURT; PERRY V. WHITMORE, Judge

ARKANSAS ELECTRIC COOPERATIVE CORPORATION,
APPELLEE

DISSENTING OPINION

ROBERT H. DUDLEY, Associate Justice

Appellee has two sources of electric power. One is from generating plants located in Arkansas. The other is from purchasing electricity from Southwest Electric Power Company, Southwestern Power Administration, Arkansas Power & Light Company and Ark-Mo Power Company. This purchased power is generated at facilities located in Oklahoma, Missouri, Texas or Arkansas and is transmitted to appellee from multi-state integrated systems or grids so that it is impossible to identify the generating facility which produced any particular energy.

Appellee sells power to A.P. & L. and to S.P.A. That power goes into multi-state grids or integrated systems maintained by those purchasers and may be transmitted and consumed in Oklahoma, Missouri, Texas or Arkansas.

Appellee is engaged in interstate commerce. The purchasing from interstate sellers of some of the power which it, in turn, sells to its member cooperatives and to other purchasers is the same sort of transaction involved in the case of *Tri-State Generation & Transmission Ass'n., Inc. v. Public Service Commission of Wyoming*, 412 F.2d 115 (10th Cir. 1969). Tri-State was a nonprofit cooperative corporation as is appellee. Tri-State had 28 R.E.A. cooperative members in three states who sold electricity at retail, while appellee has 17 R.E.A. cooperative members in Arkansas who sell electricity at retail. In *Tri-State*, the 28 member cooperatives were subject to regulation by the States, and in this case the 17-member cooperatives are regulated by the appellant P.S.C. The Tenth Circuit Court of Appeals held that Tri-State was clearly engaged in interstate commerce and the Wyoming P.S.C. action patently *had the potential of interfering with interstate commerce.* Likewise, appellee is clearly engaged in interstate commerce, and the P.S.C. action patently has the potential of interfering with interstate commerce. The majority opinion dismisses *Tri-State* by stating it "is not controlling because of distinguishing facts." Even the P.S.C. does not go that far as the Commission order states: "In candor, we should add that, for the reasons stated in the dissent therefrom, we do not think *Tri-State* was correctly decided . . . " and also that the P.S.C. will not nullify appellee's "ability to pass on the cost of purchased power to its members, as Wyoming seemingly did or was perceived by the Court of Appeals to have potentially done."

There are constitutional limitations upon state regulation of interstate commerce. In *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Company*, 273 U.S. 83 (1927), a Rhode Island company sold electricity at wholesale to a Massachusetts company. The Supreme Court denied Rhode Island the power to regulate the transaction for the sale of energy at wholesale. This was in 1927, before Congress had passed the Federal Power Act or any similar pre-emption statute, and

the Court ruled that since the sale was of concern to both Rhode Island and Massachusetts it was "national in character" and not subject to state regulation. Consequently, "if such regulation is required it can only be attained by the exercise of power in Congress." Hence, the commerce clause is a limitation upon state power, whether or not Congress has chosen to regulate.

Congress undertook federal regulation through the Federal Power Act in 1935 and the Natural Gas Act in 1938. The premise on which Congress acted was that constitutional limitations upon state regulatory power made federal regulation essential if major aspects of interstate transmission and sale were not to go unregulated. "What Congress did was to adopt the test developed in the *Attleboro* line which denied state power to regulate a sale 'at wholesale to local distributing companies' and allowed state regulation of a sale at 'local retail rates to ultimate consumers.'" *Federal Power Commission v. Southern California Edison Co., et al.*, 376 U.S. 205 at 214 (1964), discussed in treatises and articles as the "Colton case."

In the *Colton* case, supra, Southern California Edison Company, a public electric utility company, operating in central and southern California, sold energy only to customers in its California territory. These customers included the City of Colton, which used some of the power for municipal purposes but resold the bulk of the power to residential and commercial customers. The California Public Service Commission had exercised jurisdiction over the Edison-Colton energy transaction for years. The Federal Power Commission asserted jurisdiction and ultimately the Supreme Court of the United States ruled that the state could not regulate this transaction and that the Federal Power Commission could.

The majority inferentially concedes that the P.S.C. cannot regulate wholesale sales in interstate commerce. To

avoid this issue, and the *Colton* case, the majority goes outside the abstracts submitted in this case, goes to the record to reverse a trial judge, and cites a footnote to the order stating that there will be no attempt to regulate interstate commerce. However, the ordering clause of the decree provides, "Henceforth, A.E.C.C. should regard itself as subject to the jurisdiction of this Commission and within thirty days shall file with the Secretary its schedules and tariffs for approval pursuant to applicable law."

Even if it should attempt to regulate only intrastate sales it would be beyond the reach of the P.S.C. for, as stated, the regulation of the sale of electric energy at wholesale patently has the potential of interfering with interstate commerce.

The majority opinion also states that power occasionally ends up in another state, indicating this is a local operation. Yet the P.S.C. has never supplied one single figure to set out percentages of interstate versus intrastate power. Yet it is certain that interstate and intrastate power comes and goes by interstate transmission grids as appellee has very little transmission capability of its own. Even so, that is not of great significance for the Supreme Court in the *Colton* case ruled out any case by case impact analysis deciding this type of case:

> " . . . in short, our decisions have squarely rejected the view of the Court of Appeals that the scope of the FPC jurisdiction over interstate sales of gas or electricity at wholesale is to be determined by a case-by-case analysis of the impact of state regulation upon the national interest. Rather, Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary such case by case analysis . . . " 376 U.S. 205, at 215.

That bright line is that states may not regulate interstate sales of electricity at wholesale to local distributing

companies, but states may regulate rates at local retail to ultimate consumers.

The appellant contends that the Federal Power Act does not apply to electric cooperatives. This is not a determining factor for the commerce clause is a limitation upon state power whether or not Congress has chosen to regulate. However, it is worth examining. The material facts in this case are the same as those set out in *Salt River Project Agricultural Improvement and Power District v. Federal Power Commission*, 391 F.2d 470 at 473 (D.C. Cir. 1968). That court observed:

> Though REA regulation and supervision of cooperatives are, in many respects, far more comprehensive than those which the Federal Power Commission exercises over investor-owned utilities, there are certain areas, such as rate-making, where the cooperatives enjoy a freer hand. But it is in these areas that, by their structural nature, the cooperatives are effectively self-regulating. They are completely owned and controlled by their consumer-members, and only consumers can become members. They are non-profit. Each member has a single vote in the affairs of the cooperative, and service is essentially limited to members. No officer receives a salary for his services and officers and directors are prohibited from engaging in any transactions with the cooperative from which they can earn any profit.

The above paragraph, with an additional factor, is applicable to the present case. The additional factor is that much of the energy generated by appellee is sold to its owners, the 17-member cooperatives, who are fully regulated by appellant. The member cooperatives cannot pass on any increases in rates without appellant's approval. The fact that the Federal Power Act does not apply is insignificant.

Finally, there is no practical reason for the P.S.C. to regulate this non-profit wholesale cooperative. It is simply an additional layer of governmental regulation.

I dissent.

ARKANSAS
PUBLIC SERVICE COMMISSION

IN THE MATTER OF THE ASSERTION OF JURISDICTION BY THE COMMISSION OVER THE RATES AND CHARGES OF ARKANSAS ELECTRIC COOPERATIVE CORPORATION TO ITS MEMBER CO-OPERATIVES AND THE ADOPTION OF RULES OF PROCEDURE TO PROCESS APPLICATIONS FOR CHANGES IN SUCH RATES AND CHARGES	DOCKET NO. U-2992 ORDER NO. 2

ORDER

NORTON, Chairman:

On the 11th of December, 1978, the Commission gave notice that it would consider whether it had jurisdiction over the rates and charges of the Arkansas Electric Cooperative Corporation for electricity furnished its member cooperatives in the State of Arkansas.

Comments on the issue were received and a public hearing on the matter was held January 22, 1979. Those filing comments were AECC and some of its members. The Commission Staff filed a brief supporting Commission jurisdiction and AECC filed a brief in opposition. The factual setting is relatively simple. AECC is a cooperative organized pursuant to Act 342 of 1937, the members of which are seventeen other cooperatives organized under the same Act. AECC furnishes power to its members, through its own generation facilities and through purchases

from other suppliers. AECC also delivers, on an irregular sale or exchange basis, some power to such other suppliers. We presume that some amount of AECC's purchased power originates outside the State and that some of the power it delivers to other suppliers is by them transmitted beyond this State. The arguments raised are exclusively legal, revolving around a few decisions of the United States Supreme Court concerning the Commerce Clause of the Federal Constitution and the Federal Power Act. We have analyzed the issues, evaluated the arguments, studied the cases, and concluded that the questioned jurisdiction exists.

I.

The relevant Arkansas statutes impose upon this Commission jurisdiction over the rates and charges of AECC. Ark. Stat. Ann. §73-201 (A) defines the term "corporation" for purposes of utility regulation to include "an electric cooperative corporation providing service for charge or compensation in any area or from any facility for which the Commission has, or hereafter grants, a certificate of convenience and necessity." Such certificates exist for AECC.

Ark. Stat. Ann. §73-202 (a) vests this Commission with "sole and exclusive jurisdiction" and authority to determine the rates to be charged by "electric, gas, telephone or sewer public utilities" and defines that term to include corporations "producing, generating, transmitting, delivering or furnishing electricity . . . to any other person or corporation for resale or distribution to, or for, the public for compensation . . . ," which is the business of AECC.

Finally, though perhaps unnecessarily, Ark. Stat. Ann. §73-202.1 provides:

> Electric Cooperative Corporations generating, manufacturing, purchasing, acquiring, transmitting, distributing, selling, furnishing and disposing of

> electric power and energy in this State pursuant to Act 324 of 1937 as amended [Ark. Stats. (1947) Sections 77-1101 to 77-1136] shall be subject to the general jurisdiction of the Arkansas Public Service Commission in the same manner and to the same extent as now or hereafter, provided by law for the regulation, supervision or control of public utilities, except as provided herein.

The exceptions involve loans from appropriate agencies of the United States and the accounting and fiscal requirements of those agencies.

AECC is an electric cooperative corporation. As mentioned above, AECC's business, indeed its very reason for existence, is the generation, purchase and transmission of electricity for and to its members, seventeen Arkansas electricity distribution cooperatives, who retail the electricity to their members in this State. As a matter of State law, then, AECC's status and activities bring it squarely within the ratemaking authority of this Commission.

II.

An inquiry into State law, however, does not end this matter, for AECC contends its rates are beyond our jurisdiction by dint of superseding (or otherwise conflicting and controlling) Federal law. In support of this contention, AECC cites us three cases which, it says, "have established the principle that jurisdiction over wholesale rates is exclusively a Federal matter." Staff, in its brief, states that the cases cited are generally inapplicable to the situation at hand. We do not totally agree with either position.

The first case relied upon is *Public Utilities Commission of Rhode Island v. Attleboro Steam and Electric Company*, 273 U.S. 83 (1927). The Rhode Island PUC had allowed a Rhode Island electric utility, the Narragansett Company, to increase its rates to a wholesale

customer in Massachusetts, the Attleboro Company, for electricity furnished at the state border over connecting transmission lines. The Supreme Court held the rate increase unconstitutional as an attempt by Rhode Island to place a direct burden upon interstate commerce prohibited by the Commerce Clause itself rather than by a Federal statute bolstered by the Supremacy Clause. This reasoning was essential to the result because Congress had been silent upon the subject of interstate wholesale sales of electricity.

That silence continued until 1935 when enactment of the Federal Power Act granted to the Federal Power Commission regulatory jurisdiction over energy wholesaling in interstate commerce. The Supreme Court was called upon to interpret this Act in *Federal Power Commission v. Southern California Edison Company*, 376 U.S. 205 (1964) (the Colton case), the second decision from which AECC claims support. The City of Colton, California, purchased all of its electricity at wholesale from Edison and resold it at retail to the consumers in the area. Edison sold power only in California, and generated the bulk of its electricity. A small part of the electricity sold by Edison originated in other states and presumably ended up in Colton. The California Public Service Commission had regulated the Edison sales to Colton in the past, but, after the Public Service Commission's approval of a second rate increase, Colton petitioned the Federal Power Commission for a determination of jurisdiction over the sales. The Federal Power Commission decided that it had jurisdiction pursuant to Section 201 (b) of the Federal Power Act, 16 U.S.C. §824 (b). The Supreme Court, on appeal, determined that the FPC had exclusive jurisdiction over wholesale sales of electricity in interstate commerce. As the Court said, " . . . 201 (b) grants the FPC jurisdiction of all sales of electric energy at wholesale in interstate commerce not expressly exempted by the Act itself," 376 U.S. at 210. Thus, where the FPC regulates, the states may not.

The problem with this decision, for our present purposes, is that, at bottom, it merely interprets and applies

the Federal Power Act. As Staff so aptly points out, the FPC recognized three years after the Colton case that the Federal Power Act does not apply to cooperatives financed by the Rural Electrification Administration, such as AECC and its members. They are exempt from FPC regulation. *Re Dairyland Cooperative*, 67 PUR 3d 340 (1967). Most of the rationale for this decision was examined and confirmed in a similar case by the United States Court of Appeals from the District of Columbia Circuit. *Salt River Project Agricultural Improvement and Power District v. Federal Power Commission*, 129 U.S. App. D.C. 117, 391 F.2d 470 (1968), cert. denied sub nom. *Arkansas Valley G & T, Inc. v. Federal Power Commission*, 393 U.S. 857 (1968). We, too, defer generally to the wisdom of the agency charged with administering the Federal Power Act on a question of its application. *See, e.g., Udall v. Tallman*, 380 U.S. 1 (1965). The Colton case, then, is of little or no aid in our present decision.

Yet, it is argued that if we are to follow the FPC's *Dairyland* reasoning, then we must conclude, as that agency did, that REA cooperatives are "government instrumentalities" and exempt as such from Public Service Commission regulation. As was the Colton case, *Dairyland* is a decision interpreting the Federal Power Act. That Act contains a provision expressly exempting government instrumentalities from FPC jurisdiction. 16 U.S.C. §824 (f). The body of law applicable to this Commission does not. Therefore, the government instrumentality exemption is as inapplicable to the instant problem as the Colton case.

Furthermore, while we respect the judgment of the FPC in its application of the government instrumentality exemption of the Federal Power Act, we do not believe that declaration applies to cooperatives for any and all purposes. Thus, even if a similar government instrumentality exemption could be inferred from our Act 324 of 1935 and 234 of 1967, we would not be compelled to the conclusion that AECC is such an entity. *See, however, Alabama Power*

Company v. Alabama Electric Cooperative, Incorporated, 394 F.2d 672 (5th Cir. 1968).

AECC ultimately directs our attention to *Tri-State Generation & Transmission Association, Incorporated v. Public Service Commission of Wyoming*, 412 F.2d 115 (10th Cir. 1969). Tri-State was a cooperative whose members were twenty-eight other cooperatives in Colorado, Wyoming, and Nebraska. Its sole function was to purchase power wholesale from the Bureau of Reclamation which was in turn transported over Bureau facilities to Tri-State's members whom it then billed. To defray an REA loan obtain to build transmission lines, Tri-State increased its contract prices to its members; the Wyoming members attempted to file their new contracts with the Wyoming Public Service Commission and were rebuffed. The Commission gave the members to understand that the contracts would not take effect, presumably for ratemaking purposes, until the Commission had reviewed them and that, in the absence of a formal application, it had no information or data on which to base a ruling. The Wyoming cooperatives, as a result, did not pay Tri-State's increased rate.[1] Tri-State sought injunctive relief:

> Its case is based upon the proposition that the services it performs are in interstate commerce and the charges made are for transactions in commerce over which the Wyoming Commission has no jurisdiction.

412 F.2d at 117. However, at the appellate level at least, the judicial process refined the issue:

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[1] The Tenth Circuit's encapsulation of the facts does not reveal whether the cooperatives ever filed the formal application required by the Public Service Commission. As the dissent in *Tri-State* is based in part upon the existence of adequate state remedies, it may be gathered that they did not.

> . . . the real question here presented is not whether the Wyoming Commission has acted under unconstitutional statutes but whether its action has interfered with interstate commerce to such an extent as to justify favorable injunctive relief for Tri-State.

412 F.2d at 117. Unlike the District Court, the Court of Appeals determined that Tri-State was in fact engaged in interstate commerce and that the Commission "effectively prevented the Wyoming utilities from paying their contractual obligations to Tri-State," at 118, which at the time of the appellate decision, though not initially, imposed a burden upon interstate commerce sufficient to justify injunctive relief.

That result is not only remarkable on its face, but serves to distinguish *Tri-State* from the present case. The Circuit Court ruled that the District Court's decision denying relief to the cooperative was correct when made. Then it ruled that, "due to lapse of time," the District Court decision had become wrong by the time of the appellate court decision. "It is indisputable that the present hardship of withholding monies from Tri-State for a period of over two years now constitutes a severe impact upon interstate commerce and that injunctive relief must be immediately given," at 119.

Fortunately, we are not called upon to accept this line of remedial reasoning.[2] It does, however, emphasize the

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[2] The Circuit Court relied upon the *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968) and its own opinion in *Brotherhood of Railroad Trainmen v. Denver & R.G.W.R. Co.*, 370 F.2d 333, cert. denied 386 U.S. 1018, as support for its change of the trial court's once-correct decision. In the second case, a statutory change during the pendency of the appeal required a different result, and the *Permian* decision, the Supreme Court referred to the passage of time as a justification for undertaking decision of an issue that it customarily would have remanded. This seems to us to be quite different than reliance upon a lapse of time as the reason for making a decision in a certain way. We trust the Court meant to refer to events occurring during the lapse of time as the basis for its decision; at any rate, the case is not persuasively analagous to the present one.

real point of the Tenth Circuit's decision. That court was not faced with the situation we have here. All the Tenth Circuit decided was that the Wyoming Commission's action eventually, "due to lapse of time," became an enjoinable imposition upon interstate commerce. Jurisdictional questions such as ours were not at issue. Furthermore, the problem we now consider does not require us to take steps such as the Wyoming Commission took in *Tri-State*, and, even if it did, that case plainly states that that state action did not initially require judicial intervention by virtue of burdening commerce. Thus, even if we were to adopt the reasoning of the Court of Appeals in *Tri-State*, we would not be led to conclude that jurisdiction of this Commission over AECC would unconstitutionally interfere with interstate commerce.

Furthermore, *Tri-State* is factually distinct from the present case. As its name implies, the cooperative there obviously served members across state lines with power acquired from yet another entity across state lines. The Wyoming Commission effectively prohibited Wyoming cooperatives (at least in the view of the cooperatives) from paying for a cost of transmitting that power. Here AECC not only purchases power but generates it also. In other words, it not only re-wholesales as did Tri-State, but it wholesales as well, and serves its members entirely within this State, quite unlike Tri-State. Also, merely by recognizing jurisdiction over AECC, we do not affect interstate transmission as Wyoming did, nor do we nullify AECC's ability to pass on the cost of purchased power to its members, as Wyoming seemingly did or was perceived by the Court of Appeals to have potentially done.

In candor, we should add that, for the reasons stated in the dissent therefrom, we do not think *Tri-State* was correctly decided. However, that opinion matters little to our determination because, as explained above, that case is not sufficiently like this one to be of authority.

III.

AECC also makes an argument that our assertion of jurisdiction would lead to double regulation, by this agency and the Rural Electrification Administration, and that that result is unlawful. We cannot accept this argument because we do not believe that overlapping regulation, even though inconvenient, is per se illegal. If the exercise of jurisdiction by this Commission were to conflict with statutes or valid regulations administered by the REA, we expect that the Commission would be required to give way; but we see no such conflict, overt or subtle, inevitable or potential, as the relative roles of the two agencies now stand. We do not believe that the REA was intended, as this Commission is, to regulate rates of cooperatives nor do we believe that it does.

Staff's brief draws convincingly upon the legislative history of the Rural Electrification Act, 7 U.S.C. §3901, et seq., to show that ratemaking for cooperatives was not a function entrusted to the REA, but was meant to be left to the states. AECC responds by arguing that the legislative history relates to retail rates. "At that time no one had envisioned G&T [generation and transmission] cooperatives with wholesale rates." Brief of AECC at 3-4. We are not satisfied that that statement is accurate, since it purports to show what members of Congress were not thinking and, as such, faces even greater obstacles than most attempts to prove a negative. We note, too, that the Rural Electrification Act requires state consent as a prerequisite of a loan "for the construction, operation, or enlargement of any generating plant," which indicates to us that cooperative generation was envisioned after all.

Furthermore, the positive legislative testimony and remarks that do exist bear no limitation to retail rates. The Act itself is silent upon the subject of rates. It speaks essentially of loans and, as mentioned above, for some loans it not only contemplates but mandates the exercise of dual

authority. Finally, if we were to accept the proposition that Congress did not envision wholesale cooperatives, we could only conclude that Congress could not have meant to give the REA jurisdiction over them. Consequently, there could be no conflict with our jurisdiction.

AECC next refers us to its contract with its members. The REA, it is said, exercises rate jurisdiction by requiring a clause in the contract that requires the seller cooperative to review its rate at least once a year and to revise it if necessary "so that it shall produce revenues which shall be sufficient, but only sufficient . . . to meet the cost of the operation and maintenance," purchased power, transmission, debt service and retirement and "to provide for the establishment and maintenance of reasonable reserves." [3] The selling cooperative is required to give at least thirty and no more than forty-five days' notice of a rate revision to the members and the REA. The contract goes on to state that "no such revision shall be effective unless approved in writing by the Administrator" of the REA.

While we are not convinced that the full sweep of that clause is within the authority of the Administrator [4], we need not cross that bridge today. This clause in and of itself does not pose a conflict between jurisdictions since the ends sought to be served are in both precisely the same and, given the Administrator's time constraints (if, in fact, the notice "deadline" applies to him, the clause being unspecific on that point), those ends may be better served by complementary regulation.

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[3] This is hardly surprising, since AECC is statutorily bound to a non-profit status.

[4] We have some doubt that the purview of his office extends beyond an authority to assure that the rate produces revenue sufficient to repay the REA's loan.

IV.

We are left, then, with a state statutory command that we assume jurisdiction over AECC's rates and charges and corresponding Congressional silence. In the absence of a square conflict, we must return to *Attleboro* and be guided by the analysis there.

In deciding whether Rhode Island had the authority to establish a rate for the Narrangansett Company's interstate sales to the Attleboro Company, the Court reviewed two earlier cases, *Missouri v. Kansas Gas Company*, 265 U.S. 298 (1924) and *Pennsylvania Gas Company v. Public Service Commission*, 252 U.S. 23 (1920). In the latter decision, the Court had held that New York might regulate the price of gas piped into that state from Pennsylvania and sold there at retail by the same company. In *Attleboro*, the Court characterized this earlier case as holding that while a state may not directly impinge upon interstate commerce it may, when Congress is silent, indirectly regulate such commerce in the local interest; that what New York had covered, though part of an interstate transmission, was essentially local in nature; "and that such 'local service' was not of a character which required general and uniform regulation of rates by Congressional action, even if the local rates might 'affect' the interstate business of the Company." *Attleboro*, 273 U.S. at 38.

In contrast, the Kansas Gas case involved a company that transported gas from Oklahoma into Kansas and Missouri, selling it there to distribution utilities. The Court concluded that regulation of the transporting company's rate by Missouri was a direct burden upon interstate commerce forbidden by the Commerce Clause itself. The Court reasoned that the sale and delivery of Oklahoma gas in Missouri was "an inseparable part of a transaction in interstate commerce—not local, but essentially national in character . . . , *Kansas Gas*, 265 U.S. at 308; "Where the transportation, sale and delivery constitutes an unbroken

chain, fundamentally interstate from beginning to end," *Attleboro* at 89, the transaction admits only of uniform national regulation.

The *Attleboro* Court summarized the central thrust of the decision as:

> The test of the validity of a state regulation is not the character of the general business of the company, but whether the particular business which is regulated is essentially local or national in character ...

273 U.S. at 90, and explained that, if Rhode Island could set a rate for the Narragansett Company to protect customers in that state, Massachusetts could do the converse to protect the Attleboro Company's customers. "Plainly, however, the paramount interest in the interstate business carried on between the two companies is not local to either state, but is essentially national in character," at 90.

Applying this train of reasoning to the instant case, it seems to us that the rates and charges of AECC that could effectively be regulated by this Commission are for transactions essentially local in character. [5] Unlike Kansas Gas, which sold in an open interstate market, AECC exists to serve its members. Its transactions with them do not constitute "an unbroken chain, fundamentally interstate from beginning to end." Those transactions begin and end here in Arkansas. This service is hardly of the character which require(s) general and uniform regulation of rates by Congressional action." Unlike the Narragansett Company, AECC does not serve customers in other states whose

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[5] This Commission would not attempt to regulate the rate at which AECC purchases power in interstate commerce and that rate, of course, must act as a base for the price at which it resells that power to its members.

authorities might retaliate, to the detriment of interstate commerce. Unlike Rhode Island, this Commission does not seek to regulate, nor do we read our statutes as requiring us to regulate, interstate transactions of AECC, if there be any. If our regulation of rates charged to local customers has an "effect" upon interstate commerce, it can only be incidental, given a continuation of the present circumstances and policies of the company, which there is no reason not to expect. (That issue, however, can properly be dealt with only when and if it arises.) Nor does it matter what AECC's transactions with its members may be characterized as wholesale, for, as the Court said in *Attleboro*, the test "is not the character of the general business . . . but whether the particular business which is regulated is essentially local or national in character." The particular business this Commission must regulate, between AECC and its members, is decidedly local, having its paramount impacts and consequences in Arkansas and having little or no relation to any other place.

As a result we must obey the direction of our statutes. Henceforth, AECC should regard itself as subject to the jurisdiction of this Commission and within thirty days shall file with the Secretary its schedules and tariffs for approval pursuant to applicable law.

BY ORDER OF THE COMMISSION

This 2nd day of November, 1979.

W. M. Norton, Jr., Chairman

Robert C. Downie, Commissioner

John C. Pickett, Commissioner

IN THE CIRCUIT COURT OF
PULASKI COUNTY, ARKANSAS
SECOND DIVISION

ARKANSAS ELECTRIC COOPERATIVE CORPORATION — PETITIONER

VS. — NO. 80-607

ARKANSAS PUBLIC SERVICE COMMISSION — RESPONDENT

JUDGMENT

This matter is before the Court upon appeal by Arkansas Electric Cooperative Corporation from Order No. 2 of the Arkansas Public Service Commission in Docket No. U-2992, wherein the Public Service Commission asserted jurisdiction over the wholesale rates charged by Arkansas Electric Cooperative Corporation to its member cooperatives.

The Court, having reviewed the entire record and briefs of counsel, finds that Arkansas Electric Cooperative Corporation sells electrical energy at wholesale to its member cooperatives, which in turn distribute the energy to their members, the ultimate consumers of the energy; that the sales by Arkansas Electric Cooperative Corporation to its member cooperatives are wholesale sales in interstate commerce; and that the Arkansas Public Service Commission was not granted jurisdiction to regulate the rate to be charged for those sales, by Ark. Stat. Ann. Sec. 73-202a.

IT IS, THEREFORE, ORDERED AND ADJUDGED that Order No. 2 of the Arkansas Public Service Commission in Docket No. U-2992, dated November 2, 1979, is hereby set aside in its entirety.

ENTERED this 4th day of November, 1980.

/s/ Perry V. Whitmore
CIRCUIT JUDGE

LETTER FROM CLERK
OF ARKANSAS SUPREME COURT
(Dated July 20, 1981)

Re: 80-313 Arkansas Public Service Commission
v. Arkansas Electric Cooperative Corporation

Gentlemen:

The Court made the following order in the above styled case today:

"Petition for Rehearing is denied. George Rose Smith, J., not participating."

Sincerely yours,

/s/ Dona L. Williams
Dona L. Williams
Clerk

DLW:rh

IN THE SUPREME COURT OF
THE STATE OF ARKANSAS

ARKANSAS PUBLIC SERVICE
COMMISSION — APPELLANT

V. — NO. 80-313

ARKANSAS ELECTRIC
COOPERATIVE CORPORATION — APPELLEE

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES
(Filed October 5, 1981)

Notice is hereby given that Arkansas Electric Cooperative Corporation, the appellee above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Arkansas, entered in this action on July 20, 1981 and upholding appellant's assertion of jurisdiction over appellee.

This appeal is taken pursuant to 28 U.S.C. Sec. 1257 (2).

Leland F. Leatherman
711 West Third Street
Little Rock, AR 72201

and

Robert D. Cabe
1290 Worthen Bank Building
Little Rock, AR 72201

BY: /s/ Robert D. Cabe
Attorneys for Arkansas
Electric Cooperative Corp.

CERTIFICATE OF SERVICE

On October 5, 1981, a copy of the foregoing Notice of Appeal was deposited in a United States mail box, with first-class postage prepaid, addressed to Jeff Broadwater, Esq., Assistant Counsel, Arkansas Public Service Commission, 412 Union Station, Little Rock, Arkansas 72201, in accordance with Rule 28.3 of the Rules of the

Supreme Court of the United States. All parties required to be served have been served.

/s/ Robert D. Cabe
Robert D. Cabe

COMMENTS OF
ARKANSAS ELECTRIC COOPERATIVE CORPORATION
(Filed January 8, 1979)

1. Arkansas Electric Cooperative Corporation (AECC) is an electric cooperative corporation organized and existing under Act 342 of the Acts of Arkansas of 1937 as amended (Arkansas Statutes 77-1101, etc.).

2. AECC is engaged solely in the generation, transmission and purchasing of power and contracting for transmission service and serves no customer at retail. All of its sales are at wholesale for resale.

3. All of its sales for resale are to its 17 member cooperatives. However, it does transfer power and energy in and out of its system with other utilities under various interchange contracts and may incidental to such contracts make sales to others.

4. AECC is wholly owned by its 17 member cooperatives.

5. The power and energy supplied by AECC is transmitted from one state to another in interstate commerce through interconnections with the transmission systems of Arkansas Power & Light Company, Southwestern Electric Power Company and Southwestern Power Administration.

6. The interstate transmission and sale of electricity at wholesale to local distribution cooperatives is not subject to state control of rates under the decisions of the United

States Supreme Court in *Public Utilities Commission of Rhode Island v. Attleboro*, 273 U.S. 83 (1927), *FPC v. Southern California Edison Co.*, 376 U.S. 205 (1964) (the Colton case).

7. This doctrine has been reaffirmed as to generating and transmission cooperatives in *Tri-State G&T Assn. v. Wyoming Public Service Commission* (CA 10th 1969) 412 F.2d 115.

8. It is suggested the Commission has ample authority to monitor and audit the AECC rates through its jurisdiction over the member cooperatives and approval of the pass through of wholesale costs into the retail rates.

9. By use of the monitoring and auditing procedures, excessive expenses and delays of formal rate proceedings can be avoided.

APPLICATION FOR REHEARING
(Filed November 29, 1979)

Arkansas Electric Cooperative Corporation (AECC) is aggrieved by the order of this Commission, designated Order No. 2, and issued on November 2, 1979, and being so aggrieved, applies to the Commission for a rehearing on the grounds stated below:

1. The order was contrary to law.

2. The Commission erred in finding that AECC was not engaged in interstate commerce.

3. The Commission erred in holding that a state commission can exercise jurisdiction over wholesale sales of electricity in interstate commerce.

4. The Commission erred in holding that REA did not have exclusive jurisdiction over wholesale rates of electric cooperatives financed by REA.

WHEREFORE, Applicant, AECC, prays this Commission grant its application for a rehearing for the reasons stated above.

PETITION FOR REVIEW BY PULASKI COUNTY CIRCUIT COURT (Filed January 25, 1980)

Arkansas Electric Cooperative Corporation (AECC), petitioner, for its petition for a review of an order of the Arkansas Public Service Commission (PSC) in Docket No. U-2992 designated Order No. 2 and issued November 2, 1979, a copy of which is attached to this petition, states:

1. On December 11, 1978, the Arkansas Public Service Commission established Docket No. U-2992 and issued an order in that docket on that day that it proposed to consider whether it had jurisdiction of the wholesale rates of the petitioner AECC.

In this order, it provided for written comments and a hearing on January 22, 1979.

2. Comments were filed by AECC and others and oral testimony was presented at such hearing.

3. After the hearing, briefs were filed by AECC and the PSC staff.

4. On November 2, 1979, the PSC issued its Order No. 2 in such docket, finding that it did have jurisdiction over the wholesale rates of AECC.

5. On November 29, 1979, AECC filed an application for rehearing of the findings in such order.

6. The PSC has taken no action on said application for rehearing, and since a period of thirty days after its filing expired on December 29, 1979, the application for rehearing

is deemed to be denied pursuant to the provisions of Arkansas Statutes 73-229.1 (a).

7. Order No. 2 of the PSC dated November 2, 1979, is unlawful for the following reasons:

(a) The order was contrary to law.

(b) The Commission erred in finding that AECC was not engaged in interstate commerce, such finding not being supported by any evidence of any kind in the record, much less substantial evidence.

(c) The Commission erred as a matter of law by finding that it could exercise jurisdiction over the wholesale rates of AECC, since the federal government has been given regulation of wholesale rates in all cases except those which Congress has made explicitly subject to regulation by the states.

(d) The Commission erred in holding that the Rural Electrification Administration (REA) did not have exclusive jurisdiction over wholesale rates of electric cooperatives financed by REA.

WHEREFORE, Arkansas Electric Cooperative Corporation, petitions this Court to review Order No. 2 of the Arkansas Public Service Commission in Docket No. U-2992 and, after such review, to issue its judgment setting aside said order and decreeing that the Arkansas Public Service Commission has no jurisdiction to regulate the wholesale rates of AECC.

Joint Appendix

Office - Supreme Court, U.S.
FILED
AUG 6 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-731

In the

Supreme Court of the United States

October Term, 1982

Arkansas Electric Cooperative Corporation,
Appellant,

V.

Arkansas Public Service Commission
Appellee.

APPEAL FROM THE SUPREME COURT OF ARKANSAS

JOINT APPENDIX

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APPEAL DOCKETED OCTOBER 14, 1981
PROBABLE JURISDICTION NOTED JUNE 21, 1982

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No. 81-731

In the
Supreme Court of the United States

October Term, 1982

Arkansas Electric Cooperative Corporation,
Appellant,

V.

Arkansas Public Service Commission,
Appellee.

APPEAL FROM THE
SUPREME COURT OF ARKANSAS

JOINT APPENDIX

1.

CHRONOLOGICAL LIST
OF RELEVANT DOCKET ENTRIES

December 11, 1978—Order entered by the Arkansas Public Service Commission giving notice of hearing to consider jurisdiction over rates and charges of Arkansas Electric Cooperative Corporation to its member cooperatives.

January 8, 1979—Comments of Arkansas Electric Cooperative Corporation filed with Public Service Commission.

January 15, 1979—Comments of Southwest Electric Cooperative Corporation and Comments of Carroll Electric Cooperative Corporation filed with Arkansas Public Service Commission.

January 16, 1979—Comments of Ozarks Electric Cooperative Corporation filed with Arkansas Public Service Commission.

January 18, 1979—Statement of Glynn Carpenter for Woodruff Electric Cooperative Corporation filed with Arkansas Public Service Commission.

January 22, 1979—Hearing held before Public Service Commission.

November 2, 1979—Order entered by Public Service Commission asserting jurisdiction over Arkansas Electric Cooperative Corporation.

November 29, 1979—Application for rehearing before Public Service Commission filed by Arkansas Electric Cooperative Corporation. (The application for rehearing was deemed denied since the Public Service Commission did not act upon it within thirty days after it was filed. Ark. Stat. Ann. §73-229.1 (1979)).

January 25, 1980—Petition for review in Pulaski County Circuit Court filed by Arkansas Electric Cooperative Corporation.

February 21, 1980—Answer of Public Service Commission filed in Pulaski County Circuit Court.

November 4, 1980—Judgment of Circuit Court setting aside the Public Service Commission's order of November 2, 1979.

November 18, 1980—Notice of Appeal and Designation of Record filed with Arkansas Supreme Court by Public Service Commission.

June 22, 1981—Opinions of the Arkansas Supreme Court rendered.

July 9, 1981—Petition for Rehearing by Arkansas Electric Cooperative Corporation filed with Arkansas Supreme Court.

July 13, 1981—Public Service Commission's response to Petition for Rehearing filed.

July 20, 1981—Rehearing denied by Arkansas Supreme Court.

October 5, 1981—Arkansas Electric Cooperative Corporation's Notice of Appeal to the Supreme Court of the United States filed.

ARKANSAS
PUBLIC SERVICE COMMISSION

IN THE MATTER OF THE ASSERTION OF JURISDICTION BY THE COMMISSION OVER THE RATES AND CHARGES OF ARKANSAS ELECTRIC COOPERATIVE CORPORATION TO ITS MEMBER CO-OPERATIVES AND THE ADOPTION OF RULES OF PROCEDURE TO PROCESS APPLICATIONS FOR CHANGES IN SUCH RATES AND CHARGES	DOCKET NO. U-2992

ORDER

Notice is hereby given that the Commission proposes to consider whether it has jurisdiction over the rates and charges of the Arkansas Electric Cooperative Corporation for electricity

furnished its member electric cooperatives in the State of Arkansas.

If the Commission determines that it has jurisdiction over such rates and charges, it further proposes to consider procedures for the orderly and expeditious processing of applications for changes in rates and charges by Arkansas Electric Cooperative Corporation.

A public hearing to consider these matters is hereby set for Monday, January 22, 1979, at 9:30 a.m., in the Hearing Room of the Commission, Justice Building, Little Rock, Arkansas. Formal intervention shall not be necessary in order to participate in the hearing. Interested parties desiring to participate in the hearing are invited to submit written comments concerning the matters set out above. Written comments shall be submitted on paper 8½ x 14 inches in size. Each page and each line shall be numbered. An original and ten (10) copies of such written comments shall be filed with the Commission on or before Monday, January 8, 1979. Persons submitting written comments may appear and participate in the public hearing on Monday, January 22, 1979.

The Secretary of the Commission is directed to serve a copy of this Order on Arkansas Electric Cooperative Corporation and each electric cooperative corporation subject to the jurisdiction of the Commission.

BY ORDER OF THE COMMISSION

This 11th day of December, 1978.

John C. Pickett, Chairman
Robert C. Downie, Commissioner
L. Scott Stafford, Commissioner

(Certificate of Service Omitted in Printing)

BEFORE THE ARKANSAS
PUBLIC SERVICE COMMISSION

TESTIMONY

March 12, 1979
(Title Omitted in Printing)

BE IT REMEMBERED that on the 22nd day of January, 1979, before HONORABLE JOHN C. PICKETT, Chairman, the above styled claim came on for hearing and testimony was introduced as follows:

APPEARANCES:

MR. JOHN C. PICKETT, Chairman, and MR. ROBERT C. DOWNIE, Commissioner, Public Service Commission, Justice Building, Little Rock, Arkansas 72201.

MR. LELAND F. LEATHERMAN, 711 West Third Street, Little Rock, Arkansas, Attorney for Arkansas Electric Cooperative.

MR. JOHN R. ELDREDGE, III, 20 East Center Street, Fayetteville, Arkansas, 72701, Attorney for Ozark Electric Cooperative.

MR. JIM DICKSON, 2507 Forest Home, Jonesboro, Arkansas, 72401, Attorney for Carroll Electric.

MR. LEE McCULLOCH, Public Service Commission, Justice Building, Little Rock, Arkansas 72201, Attorney for Staff.

[13.]* MR. PICKETT:

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*All page references for testimony are to Vol. II of the record, and for the stamped page number rather than the court reporter's typed page number.

The hearing will please come to order. The hearing today is in the matter of the assertion of jurisdiction by the Commission over the rates and charges of Arkansas Electric Cooperative Corporation to its member cooperatives and the adoption of rules of procedure to process applications for changes in such rates and charges. It's noted in our Docket Number U-2992. Would you state your appearances, please?

MR. LEATHERMAN:

Leland F. Leatherman, for Arkansas Electric Cooperative Corporation. We have quite a few others too.

MR. ELDREDGE:

John R. Eldredge, III, for Ozark Electric Cooperative Corporation.

MR. DICKSON:

Jim Dickson, for Carroll Electric Corporation.

MR. MCCULLOCH:

Lee McCullock, for the Staff.

MR. PICKETT:

Mr. Eldredge, and Mr. Dickson, if you would like to participate, come up and sit at the front table, you're certainly welcome. Are there any opening statements?

[14] MR. LEATHERMAN:

I might briefly summarize the position of Arkansas Electric Cooperative Corporation and some of its members.

I think this has been discussed on the Board of Arkansas Electric Cooperative Corporation. I think a fair, short summary is that the Board does not consent to the jurisdiction from a legal standpoint of the Public Service Commision over the rates of Arkansas Electric, but does not object to the monitoring, auditing, and surveillance of the rates by the Public Service Commission to pass on authority over the distribution to the Cooperative. First, the legal aspects, the Arkansas Electric Cooperative Corporation is convinced this Commission has no legal jurisdiction and cannot assert legal jurisdiction over the rates of Arkansas Electric Cooperative Corporation; and the reason for this goes back to the basic historical position of the Courts that the Federal Power Commission of the United States Government through its agencies exercises jurisdiction over the wholesale rates of the utilities and interstate commerce. The State's Commission exercise jurisdiction over the retail rates. There is quite a large body of law that was developed on this primarily with regard to the investor companies; and through a series of cases the Federal Supreme Court, and other Federal Courts, determined, well from one, Arkansas [15] Power & Light Company was an interstate commerce, Florida Power & Light. The principal case, I suppose, was that a case called Allibier [sic] case, and then the Colkin [sic] case, involving Southern California Edison, those cases the Courts clearly asserted that State Commissions do not have jurisdiction over the wholesale rates of power and energy transmitted in interstate commerce. As far as the generating and transmitting cooperatives financed by REA were concerned, the Courts specifically decided that issue in a Tenth Circuit case involving the Tri-State Cooperative in Colorado, which is a GNT, just like the Arkansas Electric Cooperative Corporation; and in that case, the Court said Tri-State received power from the Bonnyville administration and then transmitted it into Wyoming. Wyoming happened to be the State, and the Court said there was absolutely no question that is an interstate commerce, that Tri-State was an interstate commerce, and

for that reason the Wyoming Commission had no jurisdiction. In the case of Arkansas Electric Cooperative Corporation, of course, it receives power from the Southwest Power Administration, and other sources outside the State of Arkansas. So its power transmits and delivers to the distribution cooperatives also comes from interstate commerce. The cases, the principal cases, involving this question from a legal [16] standpoint are cited in Paragraph Six and Seven of the comments of Arkansas Electric Cooperative Corporation. Now, from a practical standpoint, that was the legal for a practical feeling of at least a substantial number of the members of Arkansas Electric Cooperative Corporation, and of AECC, is that the Public Service Commission has the authority to monitor and audit the rates of Arkansas Electric Cooperative Corporation through its jurisdiction over the distribution cooperative; and as this Commission knows, the distribution cooperatives cannot pass on in their automatic adjustments an increase imposed by Arkansas Electric Cooperative Corporation without the authority of the Commission. I think all of the distribution cooperatives recognize that authority in the Commission. So through that authority the Commission can audit and monitor AECC and prescribe the circumstanes under which any increase imposed by AECC can be passed through by the distribution cooperative. There have been a number of questions that I guess have arisen in the minds of various members in connection with the jurisdiction of the Public Service Commission over AECC in a formal legal sense. I think the best way to describe it, it creates fear that this extra regulation would primarily cause more delays and more expense. One fear, I'm sure is, is the cost of a full blown rate case on the part [17] of AECC, and then of course another one on the part of distribution cooperatives when their rates come up. The policy of AECC in the past has been to maintain rates as close as possible to actual costs as can be done. In order to do this, there have been frequent adjustments in the AECC rates from time to time. On short notice, there may be several times a year; at one

time there was a sur-charge that would go up and down according to the necessity to maintain the AECC rates at zero margins. I think there is a fear that if a formal rate proceeding is required of AECC and it must go in, file an application, submit a rate study, that it must then propose rates that will take care of it in the future, a year or two down the road, which obviously then would have to be a great deal higher than the rates they could establish if they were frequently changed. I think also basically there is the growing fear of regulation in general, more regulation, and more regulation, and I think most of the members feel there is enough regulation as it is without having another layer by bringing AECC in. The additional feeling, I think, is what would be accomplished by the Commission taking formal jurisdiction over AECC other than what they can do right now. As I said before, under its power over the distribution cooperatives through the automatic pass through, it can in effect control and monitor the [18] rates of AECC by saying if a distribution cooperative wants to automatically pass through this increase from AECC, or if all of them at the same time, then we've got to look at that rate and determine if it's justified for the distribution cooperative to pass that increase on, and through that power effectively this Commission can control the rates of the distribution cooperative of the AECC through the distribution cooperatives, and I think it was in a sense stated in Mr. Carpenter's comments, in his last paragraph, "The AECC rates are adopted by a vote of its seventeen members. It seemed fairly obvious that if this Commission tells these seventeen members that an increase in AECC rates can only be passed on if such increase meeets certain standards, the seventeen members will see that the increase meets these standards." There is also the fear of the time and delay, everyone knows that this Commission is overloaded at the present time, and under staffed; and to file a rate case on AECC the fear is that it will be six months delay waiting to get that heard, passed on, and then after that, before it's passed on, passed through to the distribution cooperatives. There is a fear this would just add to the cost, the time lag,

and the delay, by formalizing our procedure which can be handled informally through the jurisdiction over the distribution cooperatives much [19] more faster, more expeditiously, and less expense. That briefly summarizes the AECC position, and I think there are several of the members that have comments to make; and then I don't know what the Commission's view was on how they wanted to conduct the hearing, but I have Mr. Louis Fish here that I would be glad to offer as a witness to describe for the record the AECC operation and system.

MR. DOWNIE:

Mr. Leatherman, I never did quite understand what benefits would result to anybody if the Commission undertakes a regulation of rates by AECC?

MR. LEATHERMAN:

I think that's the feeling of most of the members.

MR. DOWNIE:

You mean most of the members are as confused as I am, is that what you mean? You mean the members don't understand it either?

MR. LEATHERMAN:

That's correct.

MR. DOWNIE:

I don't quite understand what benefits there would be, do you?

MR. LEATHERMAN:

I think the members feel there wouldn't be any benefits.

[20] MR. DOWNIE:

All of them are saying it would be expensive, time consuming, and unnecessary, is that a correct summation of what their statements are?

MR. LEATHERMAN:

That's true; with the addition, it would be illegal.

MR. DOWNIE:

Do you claim that that would be some deterrent?

MR. LEATHERMAN:

It might be a deterrent.

MR. DOWNIE:

It should be? Thank you.

MR. PICKETT:

Mr. Eldredge?

MR. ELDREDGE:

We have a few comments. If Mr. Millard Goff will put those on he can make those directly, or I can question him, depending on how the Commission wants the form to be taken.

MR. PICKETT:

Mr. Eldredge, your comments have already been filed and are part of the record. We'll leave it to you if you would like to put your witness on. If you have any opening comments now, that would be appropriate.

MR. ELDREDGE:

We have no other opening comments other than those that Mr. Leatherman just made.

[21] MR. PICKETT:

Mr. Dickson?

MR. DICKSON:

Mr. Chairman, Carroll Electric adopts the remarks of Mr. Leatherman, and we have nothing further to offer at this time.

MR. PICKETT:

Mr. McCulloch?

MR. MCCULLOCH:

We have no statement.

MR. PICKETT:

Mr. Leatherman?

MR. LEATHERMAN:

I would like to put Mr. Fish on.

MR. PICKETT:

Mr. Fish –

MR. MCCULLOCH:

May I ask how many witnesses Mr. Leatherman is going to call, so we'll know who to direct questions to?

MR. LEATHERMAN:

This is the only one I will have. Mr. Eldredge will have Mr. Goff.

MR. PICKETT:

Mr. Fish would you raise your right hand and be sworn? Do you swear to tell the truth, the whole truth, and nothing but the truth so help you God?

[22] MR. FISH:

I do.

THEREUPON, LOUIS FISH, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LELAND F. LEATHERMAN:

Q. Please state your name.

A. Louis Fish.

Q. What is your position with Arkansas Electric Cooperative Corporation?

A. Assistant General Manager for Engineering and Planning.

Q. In that capacity, are you familiar with wholesale power supplies arrangements of Arkansas Electric Cooperative Corporation?

A. Yes.

Q. Would you briefly state the sources of the power the AECC sells to its member cooperatives?

A. AECC has three generating plants located in different locations in the State, which are wholly owned by Arkansas Electric Cooperatives. We also own fifty percent interest in the Flint Creek Power in Gentry, Arkansas; and beyond this we purchased that capacity and energy from Arkansas Power & Light Company. We also, from time to time, purchase replacement and emergency energy from Southwest [23] Electric Power Company. We also purchase capacity and energy under three different contracts from Southwestern Power Administration. The source of the energy, our capacity energy when we purchase from Arkansas Power & Light Company. Arkansas Power & Light Company is a wholly owned company of Middle South Utilities, which also owns, I believe, four other utilities operating outside of Arkansas. They are fully intergrated into operations, and whatever capacity and energy is available to us from Arkansas Power & Light Company obviously it's mixed and intermingled with Middle South resources, which includes generating stations outside the State of Arkansas. We also, under these arrangements, from time to time Arkansas Power & Light Company will buy energy from AECC, and this energy is purchased on an economy basis. They may very well use some of this energy for transmission to further utilities outside the State of Arkansas. Under the Southwest Electric Power Company arrangement, we do provide our own capacity basically; however, when one of our plants is down for emergency and replacement purposes, Southwest Electric Power Company does supply replacement and emergency energy. They have no generation at all in the State of Arkansas other than the Flint Creek plant, and when it is down and we are down at the same time, obviously the emergency and replacement energy comes [24] from outside the State of Arkansas. The Southwestern Power Administration contracts, one has to do with the Fitzhugh Plant at Ozark. Under that contract we buy sixty two MW of hydro peaking capacity. This capacity is purchased from the system of Southwestern Power Administration. It's an integrated system which includes generation, transmission in various States, and

including Arkansas, Oklahoma, Missouri, and Texas. This power is a mixture of whatever they have on the system. We also buy forty five MW of firm capacity energy under that same type of arrangements which comes off of the Southwestern Power Administration grid. We do have a bank arrangement under that contract whereby Southwestern Power Administration can receive energy from our Fitzhugh Plant for use on the grid when they are low in water. They pay this energy back at times when they have water; and obviously some of that energy must go into the grid and go across State borders. When they pay the energy back obviously that must come back from some other generation off of the grid, and some if it must come across State boarders. The Bailey Power Plant arrangement, this plant is owned by the system of Southwestern Power Administration in Augusta, Arkansas. Under that arrangement we purchase forty five MW of peaking capacity off of the transmission grid of Southwestern Power Administration. That grid, [25] which extends into other States, in generation in other States, the generation from Bailey do from time to time sell energy from that plant to Southwestern Power Administration. That energy is used on the Southwestern Power Administration grid wherever it is needed, in Arkansas, as well as in other States. We also, when that plant is down, can buy emergency energy from Southwestern Power Administration. This energy obviously comes off of their grid. Again, it comes from generation in Arkansas, or other States. We also have an arrangement to serve our loads on the Arkansas Missouri Power Company system. A transmission system which is both in Arkansas and Missouri. All of our loads are in Arkansas, but we schedule the energy for that load from other resources we have, either on the SPA system, or the SWEPCO system, or the AP&L system, wherever we might have it available. The result of all of this is that all of our resources our loads are served by resources that are mixed and intermingled with all of these other utilities that I've named, and all of them operate across State borders; and obviously energy

that we generate in which we use does from time to time go across State borders.

Q. Mr. Fish, getting specifically to transmission grids, does Arkansas Electric Cooperative Corporation have any transmission to speak of?

[26] A. We have very little. Basically we use the transmission grid of the other utilities in the area.

Q. Under these arrangements, these other utilities such as Southwest Electric Power Company, Arkansas Power & Light Company, Arkansas Missouri Power Company, what is the— How is this handled? How is the power gotten into those systems? Do the agreements provide that we can put power into those systems at any point on their systems?

A. Under the agreements it's our responsibility to serve our loads from whatever resources we have or can get; and where those resources come from are our responsibility. The generating plant which we own ourselves are attached to those grids and are dispatched by the dispatcher, which operates that transmission system. We do, from time to time, schedule power between these various grids to serve loads where we have resources in one area, we have loads in another.

Q. Specifically getting to the SPA purchases, if Arkansas Electric is going to deliver, use SPA power to set aside some of its loads, are the distribution cooperatives connected to the Southwestern Power Administration system, for example, can the SPA power be delivered into the system of Southwest Electric Power Company at any place where the systems of SPA and SWEPCO interconnect?

A. That is correct.

[27] Q. That may be in Oklahoma, or Arkansas, or at any point, is that correct?

A. It could be at any point. They do have physical connections other than in Arkansas.

Q. I suppose that would also be true of Arkansas Missouri Power Company, is that correct?

A. This is true, Arkansas Missouri Power Company. Anywhere that AP&L or SPA have any interconnections. Arkansas Missouri, they have delivered power and we can't deliver power from any interconnect they have.

Q. SPA and Arkansas Missouri Power Company have interconnections in Missouri, and we schedule so much SPA power into the Arkansas Missouri Power Company system. It could be delivered to ArkMo in Missouri, is that correct?

A. Yes.

Q. Just like we, say SPA power into SWEPCO system, conceivably it could be delivered at some interconnection in Oklahoma?

A. That's correct.

MR. LEATHERMAN:

That's all I have.

MR. PICKETT:

Mr. McCulloch?

CROSS-EXAMINATION
BY MR. LEE MCCULLOCH

Q. Mr. Fish, you've said AECC purchases power from SWEPCO AND AP&L, [28] and also generates its own power. I take it then the rates for the power in purchases from SWEPCO, and AP&L, and others, are set pursuant to hearing conducted by the FPC, is that correct?

A. That's correct.

Q. That is a proceeding by the particular seller to AECC under the jurisdiction of.

A. That's right.

Q. Who sets the rate that is charged for power generated by AECC?

A. The Board of Directors.

Q. The Board of Directors?

A. Yes. This is all monitored and approved by REA.

Q. To what extent does this monitored and approved by REA?

A. Well, the last time we presented a cost of service. They are elected in the organization in the beginning of each year, and practiced they are selected by the distribution cooperative.

Q. What do you mean an organization? Does the Board select its own members? I'm not really clear.

A. I'm not a lawyer. I'm an engineer. I would prefer someone else answer that question.

MR. LEATHERMAN:

I might clarify that. Arkansas Electric Cooperative Corporation has seventeen members, [29] and those members are equivalent to stockholders in a normal business corporation. Each year there is an annual meeting held at Arkansas Electric Cooperative Corporation in which each of the members, the seventeen members, by delegates votes on the election of a Board of Directors. The Board of Directors consist of the two that have been nominated by each of the distribution cooperatives. It's purely a formality, but the delegates from the member cooperatives in its annual is equivalent to a stockholders meeting elect the thirty four directors, and then after that those thirty four serve as a Board of Directors and make the policies of the Cooperative. At any time the equivalent of a stockholders meeting is required, then the members vote through delegates rather than as a Board of Directors.

MR. MCCULLOCH:

Do all members of the Cooperative have equal voting?

MR. LEATHERMAN:

All members have equal voting power, one vote each.

BY MR. LEE MCCULLOCH:

Q. Could you tell us what happens to profits in AECC if it happens?

A. To date there essentially are no profits. We have always attempted to maintain our rates so that we end up exactly [30] even with no margin, plus or minus; and to date we have very well succeeded. From year to year, there might be some positive margins, or some losses; but if there are margins they are eventually.

Q. Similar to the member cooperatives returning or what they want to do?

A. Yes.

Q. AECC also conducts some non-utility business, doesn't it?

A. No.

Q. No non-utility business?

A. Our only responsibility is wholesale power supply.

Q. Are you familiar with a company called AECI?

A. That's a separate organization.

Q. Does it have no connection with AECC?

A. None, except some share employees.

Q. They maintain books from AECC?

A. Yes.

Q. I believe you said the Board sets the rates which are charged to the member cooperatives. Are those rates approved by REA also?

A. The rates which we charge member cooperatives, yes, are approved by REA.

Q. They audit the books of AECC?

A. They do; yes.

Q. You said approved by REA. Do they actually go in and make up rates for the cooperatives?

[31] A. No. The rates are made by the Board of Directors. The REA has to approve; of course, they are concerned with the mortgage and knowing that they have good security, and the rates are a part of that security.

Q. What tier level does REA require the AECC rates, the member cooperatives to support?

A. One.

Q. One?

A. That's right.

Q. How does AECC determine allocation—

A. I'm sorry. I may have misunderstood the question. Are you speaking of AECC?

Q. REA requires individual cooperatives to maintain—

A. AECC requires and maintains, and one distribution cooperatives is different, and I can't answer your question.

Q. Okay. How do you determine in the rates from AECC to the member cooperatives, how do you determine the allocations of the different demand charges to the member cooperatives? They are not all the same, are they? For each cooperative?

A. We have one rate for all cooperatives.

Q. No matter what the load factors of the member cooperative is, he has the same demand?

A. It's the same rate; yes.

[32] Q. You talked about buying and selling. Is it SPA?

A. SPA. Southwestern Power Administration.

Q. When AECC sells something to the SPA how does it eatablish a charge for that electricity? How does it allocate all the expenses incurred to make sure that those expenses are in the price to the person?

A. Those sales are made under long term contract, and they are approved by REA when they are first made.

Q. In other words, as expenses fluctuate prices on these contracts don't?

A. Any sale we make, Southwestern Power Administration is based on fuel cost at our plant. Those fuel costs do change the energy price does change in relation to the fuel.

Q. What about all the other costs that AECC might incur, just the operation maintenance expense, management expense, all these other costs? How do you allocate those expenses between rates to member cooperatives and charges for power sold to others?

A. We sell no capacity to others at the present time. It's been several years since we have sold any capacity; but we do sell energy from time to time as it's available. Energy is always sold on the basis of some relation to fuel costs.

Q. What do you mean by capacity?

[33] A. Well, the ability of generating plants to meet a peak load. In other words, the output that the generator can put out, and this must exceed annual peak load, as the load at any other hour of the year are lower, obviously there would be excess capacity for generating energy which is not

being used by either us or any other utility, and at such times then the various utilities will try to agree with the exchange economy energy on the basis of fuel costs. In other words, we may have a generator which is not being used which has a lower cost of fuel than someone else has, and we would sell energy based on the fuel costs.

Q. I believe you told me no expenses from AECC, or any other non-utility operation, goes into the rates say that AECC for the sales made to member cooperatives, is that correct?

A. That's correct.

Q. You mentioned your plants earlier; but you said you had fifty percent of the plant. That's a coal plant?

A. That's correct.

Q. What are your other plants? Are they oil burners?

A. They are oil burners, all three of them.

Q. What's the age of those?

A. I can only approximate that. The Fitzhugh Plant was built first, I believe in 1963, which would make it [34] fifteen or sixteen years old. The Bailey Plant, I believe was placed in service in 1966, which would make it about thirteen years old. I can't name the year on the McClellon Plant, it is a few years later. It is the newest one.

Q. Are they base load plants, or are they peak plants, or oil burner plants?

A. They are being operated as base load at the present time, until we can get some coal burning capacity on so they don't have to operate as base load plants. They will eventually become peaking plants.

Q. Are all of the rural electric cooperatives in Arkansas members of AECC?

A. All except one.

Q. Except one?

A. Farmers Electric is not a member.

Q. Where is that?

A. At Newport.

Q. Would you happen to know why they are not a member of AECC?

A. No. That situation existed before I came to work in my present position.

Q. If a new electric cooperative was formed, or Farmers Electric applied for membership in AECC, would that membership be granted?

[35] A. That would be determined by the Board of Directors.

Q. Do you know what the conditions are for admission in the AECC?

A. Well, approval of the Board of Directors I would say would be it, but we have admitted Mississippi Cooperative to membership, and now sell wholesale power to them, within just the last few years. There was no special problems with doing it. No special requirements or arrangements were made.

Q. I believe you said AECC had very little transmission lines?

A. That's correct.

Q. Do you know how much transmission, how many miles?

A. We have about two hundred miles from sixty nine KV transmission over in eastern Arkansas. It's about sixteen or seventeen substations on it. It serves a portion of the two cooperatives.

Q. A substation of two cooperatives?

A. That's correct.

Q. Are all of the expenses related to those transmission lines allocated to the cooperatives which utilize?

A. Those expenses are under a policy which we have that we will provide basic transmission to all of our members by whatever means we can arrange it; and we will also provide what we call investment credit facilities, which is sub-transmission to get out to the members' load [36] center. It's the basic responsiblility of AECC to provide that for everyone, and we do, and this is the means which we have, we're providing that in that particular area; and it is added in with all of our costs.

Q. What you're saying is you lump all of those expenses in with your other expenses and come up with a rate for everybody?

A. All of our expenses are added together to come up with a rate for everyone; yes, sir.

Q. What type of expenses does AECC have other than operation and maintenance expenses?

A. Well, of course, everything that's related to the ownership and operation of the generating stations, everything that's related to the ownership and operation of the lines which we just mentioned. We also have some step down substations from power voltage down to sixty nine to serve some investment credit substations. All of the expenses related to those, we have the expense of payment to our members of investment credit for sub-transmissions, which is billed in addition to the basic transmission. We have the one large expense we do purchase a considerable amount of power at the present time, power and energy, and that purchase power is very large portion. I'm sure there are quite a number of other related expenses.

[37] Q. In Mr. Leatherman's opening statement, he said he thought the Commission currently had the power to adequately monitor the rates from AECC to the member cooperatives through their power to monitor the cost of power adjustment clauses. Isn't that what he said?

A. I believe that's what he said.

Q. Does that mean — Excuse me. Let me back track just a minute. When you sell power to a cooperative, a member cooperative, they get a bill from AECC, right?

A. That's correct.

Q. If the Commission wished to analyze the items which are the components of a bill to the member cooperatives, would the books of AECC be open to the Commission's staff for such an inspection?

A. It's my understanding they are open at the present time; yes.

Q. You see no problems whatever with the Commission's staff examining AECC books?

A. No. In fact, they have to some extent already.

MR. LEATHERMAN:

I think the Commission has conducted an audit of the AECC.

BY MR. LEE MCCULLOCH:

Q. I believe you said REA approves rates from AECC to member cooperatives. Is approval required before those particular rates can be charged?

[38] A. Our contracts with our members states that it is required; yes.

Q. But those charges are not subject to the scrutiny of any regulatory agency, is that right?

A. As Mr. Leatherman described, they are, subject to the Public Service Commission having jurisdiction over the members. REA also is concerned with member security and so they do, they look at those rates from both standpoints.

Q. What percentage of the power sales by AECC member cooperatives involve no transmission line of AECC, all SWEPCO to a member cooperative? Do you have an estimate on that?

A. It would be more than ninety percent. However, their transmission is provided by AECC and paid for through a charge to others and then beyond what we pay fueling charge for others for using their transmission, we're also pay investment credit to our members for whatever transmission facilities they own.

(OFF THE RECORD DISCUSSION)

BY MR. LEE MCCULLOCH:

Q. Again, on this REA approval on the rates charged to member cooperatives, there aren't any type of hearings, are there, that's just an examination by REA?

A. There is a long and protracted discussion by our Board [39] of Directors. It's essentially the regulation of the Board of Directors.

Q. Are you aware of any objections which have been made by the member cooperatives to the rates as set by the Board of AECC?

A. The Board acting as a whole, no; because they vote for the rates. Individual members of the Board may have difference of opinions from time to time.

Q. There is no procedure then for the member cooperatives other than through the representatives on the Board to be a party to the determination of the rates. In other words, the managers, or the two representatives of the cooperative wearing double hats, they are Board members, but at the same time they are representatives of the Cooperative?

A. It's a very direct relation. We're only completely controlled by them, and they make their own rates. The fact there are seventeen different cooperatives, and whatever type regulations there is, there would be more than one person making a determination.

Q. What does it take to approve a rate, in a thirty four member, does it take eighteen votes to approve a rate?

A. The majority vote over the Board, and there are thirty four members. It also requires REA approval.

Q. What recourse does a disgruntled member of the cooperative have if he's not satisfied with the rate?

[40] A. Well, in many ways the operation of the GNT Cooperative is determined by the corporation that exist among all of our members. If that corporation is not there then it is detrimental to all of our members, and all of our members recognize this.

Q. By the same majority vote which is referred to, is that how AECC determines what expenditures it will make by majority vote of the Board?

A. The operating report if approved monthly by the Board; yes; and an investment budget which we make is approved by the Board. Every contract which we make is approved by the Board; yes. Everything we do is approved by the Board.

Q. How many employees does AECC have?

A. I can't name the number. It is on the operating reports with the Public Service Commission, which the Public Service Commission has. I would be glad to get it. It's approximately eighty, but I don't know exactly.

Q. Are Board members paid for their service?

A. No. They receive expenses when they come to meetings.

Q. How much are these expenses?

A. I couldn't answer that question. It's out of my area.

MR. LEATHERMAN:

Seventy Five Dollars per diem, for the Directors, not the managers.

BY MR. LEE MCCULLOCH:

[41] How many Board members does AECC have per year?

A. There is one meeting per month.

Q. Would you describe the termination of a price for electricity sold by AECC to member cooperatives as an arm's length transaction?

A. No; I would not. They are very difinitely involved in the determination of the rate structure.

Q. How often are Board members elected? Did you tell us that?

A. Once a year.

Q. Do you know what percentage the costs of electricity to member cooperatives other than the costs of purchased power, do you know what the respective percentages of the cost to member cooperatives that those costs represent? In other words, purchase power and all other expenses, etc., of you own generation?

A. I can't give you the exact numbers. Our costs of our own generation in fuel is the major portion of it, at the present time; purchase capacity is also substantial. Our own generation is probably more than fifty percent; but those numbers are also on our operating reports with the Commission.

Q. Your own generation and expenses represent over fifty percent of the cost to member cooperatives?

[42] A. Yes.

MR. MCCULLOCH:

We have no further questions.

EXAMINATION BY THE COMMISSION

BY HONORABLE ROBERT C. DOWNIE:

Q. Mr. Fish, I assume the ultimate objective of this Commission is to see that the members who are also the owners of the various distribution cooperatives, that their electricity in a reliable form at the lowest reasonable rate. Is that your understanding?

A. That's my understanding; yes.

Q. Do you know of any assurance that regulation of the rates of AECC would provide to those consumers others that they do not have present?

A. Given their own involvement in the Board of Directors making direct decisions, and REA's monitoring of those decisions, and the fact that we historically have not made margins would a home owner ever recover the actual costs is difficult for me to see how it would be any benefit.

Q. Answer "yes", or "no".

A. No. I see none.

Q. Sir?

A. I see no benefits.

[43] MR. DOWNIE:

Thank you. That's all. It seems to me that's the primary question. I don't understand really all of this questions

would go out into various approvals and how many members and distribution members that belong to AECC that perhaps there are issues involved here that I don't perceive; but thank you, Mr. Fish.

MR. PICKETT:

Mr. Eldredge?

MR. ELDREDGE:

Mr. Chairman, we have no desire to offer a witness. Mr. Fish, I believe, has accurately covered the points which Mr. Goff was going to discuss, so we would not offer a witness. Thank you.

MR. PICKETT:

Mr. Dickson, do you have any questions of Mr. Fish?

MR. DICKSON:

No, Mr. Chairman. Thank you very much. We don't intend to offer any evidence ourselves.

MR. PICKETT:

Mr. Leatherman, any Re-Direct?

RE-DIRECT EXAMINATION

BY MR. LELAND F. LEATHERMAN:

Q. Mr. McCulloch has asked some questions about the costs that are used or determined the rates of AECC. Could [44] you briefly in the present rate can you reduce to mills per kilowatt hour a capacity charges essentially what those cost involve? In other words, in the energy rate how much is for fuel, how much is for non-fuel?

A. Well, the determination of the present rate is based on the energy costs per kilowatt hour being determined on the basis of fuel costs, plus one mill per killowatt hour for other variable costs we might bear with more or less generation.

Q. In other words, let me clarify that now. The energy charge for all energy purchased is entirely fuel costs except for one mill, is that correct?

A. That's correct.

Q. One mill is all that is incorporated into the energy charge to take care of all other expenses?

A. That's correct.

Q. Go ahead.

A. All other costs are assumed to be four physical facilities, investment physical facilities and operating those facilities, which are required to meet the annual peak load. So the kilowatt demand charge is based on all costs other than fuel and all other costs except the fuel in one mill go into the demand charges, and the demand is determined during AECC's annual peak hour, whatever demand the cooperative had at that time. That [45] is the demand which they pay for, for a year. So it's very simple and straight forward rate.

MR. LEATHERMAN:

That's all I have.

MR. PICKETT:

Mr. McCulloch?

RE-CROSS EXAMINATION

BY MR. LEE MCCULLOCH:

Q. I believe you said the demand charge is not the same for all cooperatives, it's determined at peak consumption?

A. The demand charge per kilowatt annual peak is the same. Obviously if they don't all have the same peak demand they don't use the same amount of energy.

MR. MCCULLOCH:

No further questions.

EXAMINATION BY THE COMMISSION

BY HONORABLE JOHN C. PICKETT:

Q. Mr. Fish, are the AECC owned plants all under the Middle South system dispatch?

A. No; only the McClellon Plant at Camden. The other two are dispatched by Southwestern Power Administration. The Flint Creek Plant is dispatched by Southwest Electric Power Company also.

Q. And all the operation and maintenance are undertaken — Let me rephrase that. For AECC's own plants, who do you [46] contract with for operations and maintenance? Do you do it yourself, or do you contract it?

A. On the three oil burning plants, Fitzhugh, Bailey, and McClellon, we operate and maintain loads completely with our own staff. The Flint Creek plant, because it's jointly owned, we have our contract with Southwest Electric Power Company provides that they will provide the staff at the plant and be responsible for maintenance and operation, and we pay our portion of the cost of it.

MR. PICKETT:

Anything further from Mr. Fish? If there is nothing further, you may be excused, Mr. Fish. We'll take a ten minute recess.

THEREUPON,

(The hearing was recessed at 10:35 A.M.)

(The hearing was reconvened at 10:50 P.M.) [sic]

MR. PICKETT:

The hearing will please come to order. Mr. Leatherman, do you have additional witnesses?

MR. LEATHERMAN:

That's all we have.

MR. PICKETT:

Mr. Eldredge, do you have any witnesses?

[47] MR. ELDREDGE:

No, Mr. Chairman.

MR. PICKETT:

Mr. Dickson?

MR. DICKSON:

Nothing further, Mr. Chairman.

MR. PICKETT:

Mr. McCulloch?

MR. MCCULLOCH:

We have no witnesses.

MR. PICKETT:

Mr. Leatherman, could I engage a conversation with you, please?

MR. LEATHERMAN:

Yes, sir.

MR. PICKETT:

AECC has two sources of power. One source of power is provided by contracts as set by the FERC, or Southwestern Power Administration, so that is a regulated source of power.

MR. LEATHERMAN:

The power purchased from SWEPCO, AP&L, or ArkMo, those rates are approved by the FERC. There are rates of the Southwestern Power Administration are established by the Southwestern Power Administration. The FERC is [48] required to approve them, but they have no authority to change them, as distinguished from the FERC jurisdiction over the investor companies. Those rates they can change them when they are submitted.

MR. PICKETT:

The second source of power is your own generated power?

MR. LEATHERMAN:

That's correct.

MR. PICKETT:

That power flows by paper into AECC, and then AECC has certain costs that it incurs in the administration and production of that self generated power, and in turn it re-wholesales that power to distribution cooperatives?

MR. LEATHERMAN:

That's correct.

MR. PICKETT:

The total of all those costs are represented by the purchase power contracts which the distribution cooperatives agree to with AECC?

MR. LEATHERMAN:

That's correct.

MR. PICKETT:

I want to talk about interstate and intrastate [49] sales, and interstate sales we don't regulate, as you identified in your opening remarks. Now, there is certain intrastate sales that are made by AECC to the distribution cooperatives that effectively are unregulated either by the FERC, or by the State Commission?

MR. LEATHERMAN:

The sales by AECC to its member cooperatives are unregulated by either FERC, or the State Commission; however, one part of your statement, as far as intrastate, interstate, from the legal standpoint, has no significance because if the power moves in interstate commerce then all sales are considered interstate even though they are intrastate as far as between the two parties. That's our contention, I'll signify it that way.

MR. PICKETT:

Couldn't AP&L make this same contention?

MR. LEATHERMAN:

All AP&L's wholesale sales are regulated by FERC.

MR. PICKETT:

And all the retail sales are regulated by our State jurisdiction?

MR. LEATHERMAN:

That's correct. It's only the wholesale sales that are controlled by FERC, are taken away from the jurisdiction [50] of the State by the Interstate Commerce, only the wholesales; the retail is left. We make their retail sales.

MR. PICKETT:

That's right. AECC is effectively a re-wholesaler, it's a jobber, so to speak. It is a layer between the power that you purchase from wholesale and the electrical, the retail distribution is distributed retail?

MR. LEATHERMAN:

Only insofar as the power that we purchase from others. As far as what we generate it's a direct wholesale. What we generate we sell directly to our members, the wholesale transaction.

MR. PICKETT:

Let's concentrate on that self generated power. That is an unregulated source of power in terms of rates so far at the point at first sale, but not at the point of final sale?

MR. LEATHERMAN:

Correct.

MR. PICKETT:

Now then, would you characterize that sale as a interstate or intrastate sale?

MR. LEATHERMAN:

The power that's generated by AECC plants is an [51] intrastate sale physically. If you could isolate that power and remove it from the other power that is interstate, the problem is that they are mixed up together into one pot.

MR. PICKETT:

Agreed. When it comes down to the distribution cooperative level it's certainly mixed, but for accounting purposes when it flows into AECC it is not mixed? The accounting is not mixed, but the energy is mixed?

MR. LEATHERMAN:

Right.

MR. PICKETT:

Now then, let's concentrate on that self generated power by AECC. The next question that we have to ask is AECC a public utility under the Arkansas Statute?

MR. LEATHERMAN:

It is my opinion, although the Statute is vague on it, that it is a public utility. There is a certain amount of vagueness in the Statute that places the cooperatives under jurisdiction of the Public Service Commission with respect

to certain things, but I have assumed and operated on the theory that it is a public utility.

MR. PICKETT:

Given due regards for the Southwestern Electric [52] Cooperative, Carroll, Ozark, Carpenter, concerns as Commissioner Downie expressed earlier, what if we had a retail distribution cooperative who had a rate filing here and an industrial intervenor contested the purchase power contract that the retail cooperative signs with the AECC; how could the Commission defend itself, or write an order certifying that those costs that were included in the purchase power contract from self generated power were just and reasonable?

MR. LEATHERMAN:

From a legal standpoint, there would be nothing they could do, the industrial customer, could do about that contract. From the practical standpoint, if that contract we're speaking now of the AECC member contract, if the Commission wanted to assure the industrial customer that the costs that were passed through in the rates under that contract were adequate, they could do that by an audit of AECC. They have that authority in the orders that they permit the distribution cooperative to pass through the rates from AECC. Now, that contract they could not touch legally however.

MR. PICKETT:

If during a rate proceeding, could an intervenor raise that purchase power contract as an issue at that point in time?

[53] MR. LEATHERMAN:

They could raise the rates; the rates that are charged under that wholesale power contract could be questioned by

an intervenor as being arbitrary, and not consistent with the costs of AECC, or whatever grounds they wanted to for the design of the rate and so forth. They could question those rates in a distribution cooperative proceeding on intervenor. Now, those rates could be monitored for that, however, by the Commission. When AECC proposes an increase in rates if at that time when the Commission decides shall we permit the seventeen members to pass through that increase, then the Commission can determine if at that time whether those rates are adequate, arbitrary, discriminatory.

MR. PICKETT:

Now, then, what if the Commission audited the purchase power rates and found them lacking in some characteristics, what would be the Commission's course of action, legal source of action, AECC's legal source of action, if there was a disagreement either in the total costs or the allocation of costs;

MR. LEATHERMAN:

As far as the total costs of AECC, its purchase power component?

[54] MR. PICKETT:

No.

MR. LEATHERMAN:

There is nothing this Commission can do about that.

MR. PICKETT:

No, self generated power.

MR. LEATHERMAN:

Self generated power, that if the Commission determines AECC is charging in its rates double what it's actual cost of generated power is, then this Commission can refuse to admit the extra costs to be passed through by the member cooperatives.

MR. PICKETT:

Who would file suit if they disagreed with the Commission's opinion? Would the retail cooperatives sue us, take us through the appellate process, or would AECC take us through the appellate process?

MR. LEATHERMAN:

Distribution member cooperatives, under AECC may intervene.

MR. PICKETT:

Do you have a suggestion on how we can begin the procedure of a formal audit of AECC's own generated costs?

MR. LEATHERMAN:

I think you have the jurisdiction right now. You [55] have the jurisdiction in this Commission to audit the AECC books at any time.

MR. PICKETT:

Unless we have—Perhaps you've answered the question. Since you have said the AECC you think is a public utility and we audited the books then we could enforce our determination of whatever it may be on AECC?

MR. LEATHERMAN:

All we're talking about is the jurisdiction over the AECC wholesale rates. There is no question this Commission has jurisdiction over AECC as far as certificates, convenience, and necessity are concerned, and as far as all the other things are concerned. You have that jurisdiction. All we're talking about is the wholesale rate jurisdiction.

MR. PICKETT:

How could we have jurisdiction over power plants citings and not have jurisdiction over rates under our Statute?

MR. LEATHERMAN:

The Cooperative Statute specifically gives the Commission jurisdiction over the certificates of convenience and necessity. The only reason you don't have it over the wholesale rates is because of Federal law.

[56] MR. PICKETT:

The wholesale rate for self generated electricity, not the energy that AECC purchases under a wholesale rate?

MR. LEATHERMAN:

I agree, you can't separate the two.

MR. PICKETT:

But for accounting purposes can we separate them?

MR. LEATHERMAN:

You can separate the costs, but you cannot separate the portions of the rates.

MR. PICKETT:

Agreed. We can identify the total costs?

MR. LEATHERMAN:

You can identify the costs related to.

MR. PICKETT:

But we couldn't set a purchase power rate that would say power purchased by AECC and have a separate rate and say power self generated by AECC. I agree with that proposition, I mean that's an undue and unwarranted complication of rate making.

MR. LEATHERMAN:

Because of the way that the energy and so forth is all mixed together, it would be impossible to identify where energy goes and comes from what source.

MR. PICKETT:

I agree completely. Do you have a procedure to [57] suggest that we could audit and set the standards for rate making which you referenced from Mr. Carpenter's testimony and adopted in your opening statement?

MR. LEATHERMAN:

Yes. I think the first place to start is what is the Commission concerned with; and what is the objective. Obviously, one is costs; are the costs correct; what are the costs that AECC incurs that are passed on in the rates. Those the Commission can take care of by audit. The other aspect, and I don't know whether this may or may not enter into, and that is the design of the rate; and under the standards that are going to be involved and published by

the Department of Energy under the National, it is conceivable to me that the rate design might be of concern to the Commission. It may not. Because of the nature of the AECC operation it's a very simply rate; and may be only one way to design the rate; but conceivably if this Commission found that the design of the AECC rating had influence on the design of the distribution cooperative rates under PURPA, to meet the standards of PURPA, and that would be another area in which this Commission would be concerned. Then if it is concerned about that, if it develops, that's relevant, then this Commission can require any time AECC proposes a rate increase, they [58] notify this Commission, file the rate increase with this Commission, and if the Commission then can examine that audit, do whatever procedure they want to, and then make its order as to whether the seventeen member cooperatives can pass on that increase, and through that order this Commission effectively can control the design of the AECC rate. Now, as I mentioned earlier, one of the concerns is the lag. It would be hoped that the Commission audited AECC say annually for regular intervals so it was not necessary when AECC proposed a change in its rate, that an audit be made subsequent to that, and you have to wait six months or so before AECC can put the rate in. That's one of the problems, if AECC has to project rates for a year in advance, they've got to be higher than what they are projected at the present time, because if they know they can change the rates on six months, of whenever it's necessary, annually, to keep the costs exactly close to zero as possible. They can have much lower rates than if they have to project them for a long period in the future. AECC has no objection to the auditing procedure, and is hoped that can be done regularly so that there is not a part of the rate filing when the rate filing comes up. All is necessary is to see whether it is in conformity with the last audit [59] and the rate design does not interpose any hardships on the rate design of the distribution cooperatives.

MR. PICKETT:

Mr. Leatherman, I agree with you on approximately one hundred percent; but the question is, how do we begin and implement the process so that we don't generate a bunch of regulatory lags, and we do not have to undertake a complete audit of AECC everytime you want to adjust your rates? Perhaps we could do an audit of AECC in conjunction with the first, a first retail electric cooperative establish some standards, incorporate those in the order, and then any time AECC wanted to change the rate they could certify that the change meets the standards as previously established. Not unlike the procedure we go through about fuel adjustment clauses.

MR. LEATHERMAN:

I think that would be a good idea. It sounds like an excellent idea. I think the Commission can issue an order setting up these procedures. The order would say, in order for a pass through of the increases to be approved by this Commission, the following must be first met.

MR. PICKETT:

Which retail electrical cooperative do you suggest that we start with?

[60] MR. LEATHERMAN:

You mean in a rate case? You have one put in right now involving First Electric Cooperative. That particular rate case also involves PURPA, because they are a subject to it. As far as AECC is concerned, AECC would like this Commission to audit as soon as possible to avoid delay. Now, we recognize you also have an audit in First involving their rate cause; but as far as the AECC part, AECC has no objection to an audit being made starting tomorrow; if you have the personnel available.

MR. PICKETT:

We do.

MR. LEATHERMAN:

If you do?

MR. PICKETT:

We don't.

MR. LEATHERMAN:

That's what I was afraid of. As soon as you have them available; and the audit of AECC shall not be very time consuming because it involves very little, it's a very simple operation.

MR. PICKETT:

So you're suggesting that the Commission does have jurisdiction over AECC self generated wholesale rates to the retail electrical distribution cooperatives?

[61] MR. LEATHERMAN:

No. I don't conceive that you have any jurisdiction over any of the AECC wholesale rates. What you have jurisdiction over is the distribution cooperatives and what they can pass through to their customers; and you have jurisdiction over AECC in all respects except wholesale rates.

MR. PICKETT:

You're saying that we have jurisdiction over AECC via the retail cooperatives?

MR. LEATHERMAN:

Right; over the rates. You have direct jurisdiction in other respects. You have jurisdiction now under the law over AECC, except the wholesale rates. You have control over the wholesale rates through the retail customers, member cooperatives.

MR. PICKETT:

You recommended that we undertake an audit of the AECC, establish and according to the rules of due process, the costs and the method of allocating those costs to the retail distribution cooperatives in conjunction with a retail rate case either currently filed or will be filed in the future?

MR. LEATHERMAN:

That's correct; except I think you can make the [62] audit irrespective to that to establish the correctness of the costs. Now, as far as the allocations are concerned, that is a separate item that would need to be examined each time there is a change in the AECC rates; but the costs, the adequacy of the correctness of the costs can be established by an audit right now. We can get that out of the way. The allocation of those costs properly would come into the First Electric rate case in determining how we're going to treat the AECC's costs.

MR. PICKETT:

Do you think the AECC should be involved in the deliberations that the Commission has on the PURPA of the future?

MR. LEATHERMAN:

If the design of the wholesale rate has any bearing or any effect of the concurrence of the standards of PURPA, I do.

MR. PICKETT:

It should have gone in directly?

MR. LEATHERMAN:

Right.

MR. PICKETT:

Not through the retail distribution cooperatives?

[63] MR. LEATHERMAN:

Right.

MR. PICKETT:

One final question. Why is it your opinion that we have jurisdiction over AECC directly for facilities but not for rates?

MR. LEATHERMAN:

Because that is spelled out in Act 324 establishing the law which governs electric cooperatives.

MR. PICKETT:

As I read that, it's specifically directed towards the retail distribution cooperatives.

MR. LEATHERMAN:

I think it covers all cooperatives organized under that Act, and AECC is organized under that ACT.

MR. PICKETT:

So because it was not specifically included, it is excluded?

MR. LEATHERMAN:

It is included as far as facilities are concerned, and AECC being organized under Act 324 is required to get certificates and they always have gotten certificates. As far as wholesale rates are concerned, as far as the Arkansas law is concerned, we are covered for wholesale rates; but the problem is that the Federal law supercedes [64] that; as a matter of fact, that specific portion of the General Utilities Statute in Arkansas it says wholesale rates are subject to the jurisdiction of the Commission; and that's been superceded by the Federal law.

MR. PICKETT:

Is there anything further that needs to be brought to the Commission's attention in this proceeding?

MR. LEATHERMAN:

No; that's all.

MR. McCULLOCH:

Nothing.

MR. PICKETT:

Mr. Eldredge?

MR. ELDREDGE:

We have nothing.

MR. PICKETT:

Mr. Dickson?

MR. DICKSON:

None, Mr. Chairman.

MR. PICKETT:

If there is nothing further to come before the Commission in this proceeding, then this proceeding is considered as firmly submitted to the Commission for its decision. The hearing is closed.

THEREUPON,
The hearing was ended.

(CERTIFICATE OMITTED in PRINTING)

ARKANSAS
PUBLIC SERVICE COMMISSION

IN THE MATTER OF THE ASSERTION OF JURISDICTION BY THE COMMISSION OVER THE RATES AND CHARGES OF ARKANSAS ELECTRIC COOPERATIVE CORPORATION TO ITS MEMBER CO-OPERATIVES AND THE ADOPTION OF RULES OF PROCCEDURE TO PROCESS APPLICATIONS FOR CHANGES IN SUCH RATES AND CHARGES	DOCKET NO. U-2992 ORDER NO. 2

ORDER

(Entered Nov. 2, 1979)

NORTON, Chairman:

On the 11th of December, 1978, the Commission gave notice that it would consider whether it had jurisdiction over the rates and charges of the Arkansas Electric Cooperative Corporation for electricity furnished its member cooperatives in the State of Arkansas.

Comments on the issue were received and a public hearing on the matter was held January 22, 1979. Those filing comments were AECC and some of its members. The Commission Staff filed a brief supporting Commission jurisdiction and AECC filed a brief in opposition. The factual setting is relatively simple. AECC is a cooperative organized pursuant to Act 342 of 1937, the members of which are seventeen other cooperatives organized under the same Act. AECC furnishes power to its members, through its own generation facilities and through purchases from other supplies. AECC also delivers, on an irregular sale or exchange basis, some power to such other suppliers. We presume that some amount of AECC's purchased power originates outside the State and that some of the power it delivers to other suppliers is by them transmitted beyond this State. The arguments raised are exclusively legal, revolving around a few decisions of the United States Supreme Court concerning the Commerce Clause of the Federal Constitution and the Federal Power Act. We have analyzed the issues, evaluated the arguments, studied the cases, and concluded that the questioned jurisdiction exists.

I.

The relevant Arkansas statutes impose upon this Commission jurisdiction over the rates and charges of AECC. Ark. Stat. Ann. §73-201 (A) defines the term

"corporation" for purposes of utility regulation to include "an electric cooperative corporation providing service for charge or compensation in any area or from any facility for which the Commission has, or hereafter grants, a certificate of convenience and necessity." Such certificates exist for AECC.

Ark. Stat. Ann. §73-202 (a) vests this Commission with "sole and exclusive jurisdiction" and authority to determine the rates to be charged by "electric, gas, telephone or sewer public utilities" and defines that term to include corporations "producing, generating, transmitting, delivering or furnishing electricity . . . to any other person or corporation for resale or distribution to, or for, the public for compensation . . . ," which is the business of AECC.

Finally, though perhaps unnecessarily, Ark. Stat. Ann. §73-202.1 provides:

> Electric Cooperative Corporations generating, manufacturing, purchasing, acquiring, transmitting, distributing, selling, furnishing and disposing of electric power and energy in this State pursuant to Act 324 of 1937 as amended [Ark. Stats. (1947) Sections 77-1101 to 77-1136] shall be subject to the general jurisdiction of the Arkansas Public Service Commission in the same manner and to the same extent as now or hereafter, provided by law for the regulation, supervision or control of public utilities, except as provided herein.

The exceptions involve loans from appropriate agencies of the United States and the accounting and fiscal requirements of those agencies.

AECC is an electric cooperative corporation. As mentioned above, AECC's business, indeed its very reason for existence, is the generation, purchase and transmission of electricity for and to its members, seventeen Arkansas electricity distribution cooperatives, who retail the

electricity to their members in this State. As a matter of State law, then, AECC's status and activities bring it squarely within the ratemaking authority of this Commission.

II.

An inquiry into State law, however, does not end this matter, for AECC contends its rates are beyond our jurisdiction by dint of superseding (or otherwise conflicting and controlling) Federal law. In support of this contention, AECC cites us three cases which, it says, "have established the principle that jurisdiction over wholesale rates is exclusively a Federal matter." Staff, in its brief, states that the cases cited are generally inapplicable to the situation at hand. We do not totally agree with either position.

The first case relied upon is *Public Utilities Commission of Rhode Island v. Attleboro Steam and Electric Company*, 273 U.S. 83 (1927). The Rhode Island PUC had allowed a Rhode Island electric utility, the Narragansett Company, to increase its rates to a wholesale customer in Massachusetts, the Attleboro Company, for electricity furnished at the state border over connecting transmission lines. The Supreme Court held the rate increase unconstitutional as an attempt by Rhode Island to place a direct burden upon interstate commerce prohibited by the Commerce Clause itself rather than by a Federal statute bolstered by the Supremacy Clause. This reasoning was essential to the result because Congress had been silent upon the subject of interstate wholesale sales of electricity.

That silence continued until 1935 when enactment of the Federal Power Act granted to the Federal Power Commission regulatory jurisdiction over energy wholesaling in interstate commerce. The Supreme Court was called upon to interpret this Act in *Federal Power Commission v. Southern California Edison Company*, 276 U.S. 205 (1964) (the Colton case), the second decision from which AECC claims support. The City of Colton, California, purchased all of its electricity at wholesale from Edison and resold it at retail to the consumers in the area. Edison sold power only in California, and generated the bulk of its

electricity. A small part of the electricity sold by Edison originated in other states and presumably ended up in Colton. The California Public Service Commission had regulated the Edison sales to Colton in the past, but, after the Public Service Commission's approval of a second rate increase, Colton petitioned the Federal Power Commission for a determination of jurisdiction over the sales. The Federal Power Commission decided that it had jurisdiction pursuant to Section 201 (b) of the Federal Power Act, 16 U.S.C. §824 (b). The Supreme Court, on appeal, determined that the FPC had exclusive jurisdiction over wholesale sales of electricity in interstate commerce. As the Court said, " . . . 201 (b) grants the FPC jurisdiction of all sales of electric energy at wholesale in interstate commerce not expressly exempted by the Act itself." 376 U.S. at 210. Thus, where the FPC regulates, the states may not.

The problem with this decision, for our present purposes, is that, at bottom, it merely interprets and applies the Federal Power Act. As Staff so aptly points out, the FPC recognized three years after the Colton case that the Federal Power Act does not apply to cooperatives financed by the Rural Electrification Administration, such as AECC and its members. They are exempt from FPC regulation. *Re Dairyland Cooperative*, 67 PUR 3d 340 (1967). Most of the rationale for this decision was examined and confirmed in a similar case by the United States Court of Appeals from the District of Columbia Circuit. *Salt River Project Agricultural Improvement and Power District v. Federal Power Commission*, 129 U.S. App. D.C. 117, 391 F.2d 470 (1968), cert. denied sub nom. *Arkansas Valley G & T, Inc. v. Federal Power Commission*, 393 U.S. 857 (1968). We, too, defer generally to the wisdom of the agency charged with administering the Federal Power Act on a question of its application. *See, e.g. Udall v. Tallman*, 380 U.S. 1 (1965). The Colton case, then, is of little or no aid in our present decision.

Yet, it is argued that if we are to follow the FPC's *Dairyland* reasoning, then we must conclude, as that agency did, that REA cooperatives are "government instrumentalities" and exempt as such from Public Service

Commission regulation. As was the Colton case, *Dairyland* is a decision interpreting the Federal Power Act. That Act contains a provision expressly exempting government instrumentalities from FPC jurisdiction. 16 U.S.C. §824 (f). The body of law applicable to this Commission does not. Therefore, the government instrumentality exemption is as inapplicable to the instant problem as the Colton case.

Furthermore, while we respect the judgment of the FPC in its application of the government instrumentality exemption of the Federal Power Act, we do not believe that declaration applies to cooperatives for any and all purposes. Thus, even if a similar government instrumentality exemption could be inferred from our Act 324 of 1935 and 234 of 1967, we would not be compelled to the conclusion that AECC is such an entity. *See, however, Alabama Power Company v. Alabama Electric Cooperative, Incorporated,* 394 F.2d 672 (5th Cir. 1968).

AECC ultimately directs our attention to *Tri-State Generation & Transmission Association, Incorporated v. Public Service Commission of Wyoming,* 412 F.2d 115 (10th Cir. 1969). Tri-State was a cooperative whose members were twenty-eight other cooperatives in Colorado, Wyoming, and Nebraska. Its sole function was to purchase power wholesale from the Bureau of Reclamation which was in turn transported over Bureau facilities to Tri-State's members whom it then billed. To defray an REA loan obtain to build transmission lines, Tri-State increased its contract prices to its members; the Wyoming members attempted to file their new contracts with the Wyoming Public Service Commission and were rebuffed. The Commission gave the members to understand that the contracts would not take effect, presumably for ratemaking purposes, until the Commission had reviewed them and that, in the absence of a formal application, it had no information or data on which to base a ruling. The Wyoming cooperatives, as a result, did not pay Tri-State's increased rate.[1] Tri-State sought injunctive relief:

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[1] The Tenth Circuit's encapsulation of the facts does not reveal whether the cooperatives ever filed the formal application required by the Public Service Commission. As the dissent in *Tri-State* is based in part upon the existence of adequate state remedies, it may be gathered that they did not.

> Its case is based upon the proposition that the services it performs are in interstate commerce and the charges made are for transactions in commerce over which the Wyoming Commission has no jurisdiction.

412 F.2d at 117. However, at the appellate level at least, the judicial process refined the issue:

> . . . the real question here presented is not whether the Wyoming Commission has acted under unconstitutional statutes but whether its action has interfered with interstate commerce to such an extent as to justify favorable injunctive relief for Tri-State.

412 F.2d at 117. Unlike the District Court, the Court of Appeals determined that Tri-State was in fact engaged in interstate commerce and that the Commission "effectively prevented the Wyoming utilities from paying their contractual obligations to Tri-State," at 118, which at the time of the appellate decision, though not initially, imposed a burden upon interstate commerce sufficient to justify injunctive relief.

That result is not only remarkable on its fact, but serves to distinguish *Tri-State* from the present case. The Circuit Court ruled that the District Court's decision denying relief to the cooperative was correct when made. Then it ruled that, "due to lapse of time," the District Court decision had become wrong by the time of the appellate court decision. "It is indisputable that the present hardship of withholding monies from Tri-State for a period of over two years now constitutes a severe impact upon interstate commerce and that injunctive relief must be immediately given," at 119.

Fortunately, we are not called upon to accept this line of remedial reasoning.[2] It does, however, emphasize the real point of the Tenth Circuit's decision. That court was not faced with the situation we have here. All the Tenth Circuit decided was that the Wyoming Commission's action eventually, "due to lapse of time," became an enjoinable imposition upon interstate commerce. Jurisdictional questions such as ours were not at issue. Furthermore, the problem we now consider does not require us to take steps such as the Wyoming Commission took in *Tri-State*, and, even if it did, that case plainly states that that state action did not initially require judicial intervention by virtue of burdening commerce. Thus, even if we were to adopt the reasoning of the Court of Appeals in *Tri-State*, we would not be led to conclude that jurisdiction of this Commission over AECC would unconstitutionally interfere with interstate commerce.

Furthermore, *Tri-State* is factually distinct from the present case. As its name implies, the cooperative there obviously served members across state lines with power acquired from yet another entity across state lines. The Wyoming Commission effectively prohibited Wyoming cooperatives (at least in the view of the cooperatives) from paying for a cost of transmitting that power. Here AECC not only purchases power but generates it also. In other words, it not only re-wholesales as did Tri-State, but it wholesales as well, and serves its members entirely within this State, quite unlike Tri-State. Also, merely by recognizing jurisdiction over AECC, we do not affect

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[2] The Circuit Court relied upon the *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968) and its own opinion in *Brotherhood of Railroad Trainmen v. Denver & R.G.W.R. Co.*, 370 F.2d 333, cert. denied 386 U.S. 1018, as support for its change of the trial court's once-correct decision. In the second case, a statutory change during the pendency of the appeal required a different result, and the *Permian* decision, the Supreme Court referred to the passage of time as a justification for undertaking decision of an issue that it customarily would have remanded. This seems to us to be quite different than reliance upon a lapse of time as the reason for making a decision in a certain way. We trust the Court meant to refer to events occurring during the lapse of time as the basis for its decision; at any rate, the case is not persuasively analagous to the present one.

interstate transmission as Wyoming did, nor do we nullify AECC's ability to pass on the cost of purchased power to its members, as Wyoming seemingly did or was perceived by the Court of Appeals to have potentially done.

In candor, we should add that, for the reasons stated in the dissent therefrom, we do not think *Tri-State* was correctly decided. However, that opinion matters little to our determination because, as explained above, that case is not sufficiently like this one to be of authority.

III.

AECC also makes an argument that our assertion of jurisdiction would lead to double regulation, by this agency and the Rural Electrification Administration, and that that result is unlawful. We cannot accept this argument because we do not believe that overlapping regulation, even though inconvenient, is per se illegal. If the exercise of jurisdiction by this Commission were to conflict with statutes or valid regulations administered by the REA, we expect that the Commission would be required to give way; but we see no such conflict, overt or subtle, inevitable or potential, as the relative roles of the two agencies now stand. We do not believe that the REA was intended, as this Commission is, to regulate rates of cooperatives nor do we believe that it does.

Staff's brief draws convincingly upon the legislative history of the Rural Electrification Act, 7 U.S.C. §3901, et seq., to show that ratemaking for cooperatives was not a function entrusted to the REA, but was meant to be left to the states. AECC responds by arguing that the legislative history relates to retail rates. "At that time no one had envisioned G&T [generation and transmission] cooperatives with wholesale rates." Brief of AECC at 3-4. We are not satisfied that that statement is accurate, since it purports to show what members of Congress were not thinking and, as such, faces even greater obstacles than most attempts to

prove a negative. We note, too, that the Rural Electrification Act requires state consent as a prerequisite of a loan "for the construction, operation, or enlargement of any generating plant," which indicates to us that cooperative generation was envisioned after all.

Furthermore, the positive legislative testimony and remarks that do exist bear no limitation to retail rates. The Act itself is silent upon the subject of rates. It speaks essentially of loans and, as mentioned above, for some loans it not only contemplates but mandates the exercise of dual authority. Finally, if we were to accept the proposition that Congress did not envision wholesale cooperatives, we could only conclude that Congress could not have meant to give the REA jurisdiction over them. Consequently, there could be no conflict with our jurisdiction.

AECC next refers us to its contract with its members. The REA, it is said, exercises rate jurisdiction by requiring a clause in the contract that requires the seller cooperative to review its rate at least once a year and to revise it if necessary "so that it shall produce revenues which shall be sufficient, but only sufficient . . . to meet the cost of the operation and maintenance," purchased power, transmission, debt service and retirement and "to provide for the establishment and maintenance of reasonable reserves." [3] The selling cooperative is required to give at least thirty and no more than forty-five days' notice of a rate revision to the members and the REA. The contract goes on to state that "no such revision shall be effective unless approved in writing by the Administrator" of the REA.

While we are not convinced that the full sweep of that clause is within the authority of the Administrator [4], we

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[3] This is hardly surprising, since AECC is statutorily bound to a non-profit status.

[4] We have some doubt that the purview of his office extends beyond an authority to assure that the rate produces revenue sufficient to repay the REA's loan.

need not cross that bridge today. This clause in and of itself does not pose a conflict between jurisdictions since the ends sought to be served are in both precisely the same and, given the Administrator's time constraints (if, in fact, the notice "deadline" applies to him, the clause being unspecific on that point), those ends may be better served by complementary regulation.

IV.

We are left, then, with a state statutory command that we assume jurisdiction over AECC's rates and charges and corresponding Congressional silence. In the absence of a square conflict, we must return to *Attleboro* and be guided by the analysis there.

In deciding whether Rhode Island had the authority to establish a rate for the Narrangansett Company's interstate sales to the Attleboro Company, the Court reviewed two earlier cases, *Missouri v. Kansas Gas Company*, 265 U.S. 298 (1924) and *Pennsylvania Gas Company v. Public Service Commission*, 252 U.S. 23 (1920). In the latter decision, the Court had held that New York might regulate the price of gas piped into that state from Pennsylvania and sold there at retail by the same company. In *Attleboro*, the Court characterized this earlier case as holding that while a state may not directly impinge upon interstate commerce it may, when Congress is silent, indirectly regulate such commerce in the local interest; that what New York had covered, through part of an interstate transmission, was essentially local in nature; "and that such 'local service' was not of a character which required general and uniform regulation of rates by Congressional action, even if the local rates might 'affect' the interstate business of the Company." *Attleboro*, 273 U.S. at 38.

In contrast, the Kansas Gas case involved a company that transported gas from Oklahoma into Kansas and Missouri, selling it there to distribution utilities. The Court concluded that regulation of the transporting company's rate by Missouri was a direct burden upon interstate commerce forbidden by the Commerce Clause itself. The Court reasoned that the sale and delivery of Oklahoma gas in Missouri was "an inspearable part of a transaction in interstate commerce—not local, but essentially national in character . . . ", *Kansas Gas*, 265 U.S. at 308; "Where the transportation, sale and delivery constitutes an unbroken chain, fundamentally interstate from beginning to end," *Attleboro* at 89, the transaction admits only of uniform national regulation.

The *Attleboro* Court summarized the central thrust of the decision as:

> The test of the validity of a state regulation is not the character of the general business of the company, but whether the particular business which is regulated is essentially local or national in character . . .

273 U.S. at 90, and explained that, if Rhode Island could set a rate for the Narragansett Company to protect customers in that state, Massachusetts could do the converse to protect the Attleboro Company's customers, "Plainly, however, the paramount interest in the interstate business carried on between the two companies is not local to either state, but is essentially national in character," at 90.

Applying this train of reasoning to the instant case, it seems to us that the rates and charges of AECC that could effectively be regulated by this Commission are for transactions essentially local in character. [5] Unlike Kansas

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[5] This Commission would not attempt to regulate the rate at which AECC purchases power in interstate commerce and that rate, of course, must act as a base for the price at which it resells that power to its members.

Gas, which sold in an open interstate market, AECC exists to serve its members. Its transactions with them do not constitute "an unbroken chain, fundamentally interstate from beginning to end." Those transactions begin and end here in Arkansas. This service is hardly of the character which require(s) general and uniform regulation of rates by Congressional action." Unlike the Narragansett Company, AECC does not serve customers in other states whose authorities might retaliate, to the detriment of interstate commerce. Unlike Rhode Island, this Commission does not seek to regulate, nor do we read our statutes as requiring us to regulate, interstate transactions of AECC, if there be any. If our regulation of rates charged to local customers has an "effect" upon interstate commerce, it can only be incidental, given a continuation of the present circumstances and policies of the company, which there is no reason not to expect. (That issue, however, can properly be dealt with only when and if it arises.) Nor does it matter what AECC's transactions with its members may be characterized as wholesale, for, as the Court said in *Attleboro*, the test "is not the character of the general business . . . but whether the particular business which is regulated is essentially local or national in character." The particular business this Commission must regulate, between AECC and its members, is decidedly local, having its paramount impacts and consequences in Arkansas and having little or no relation to any other place.

As a result we must obey the direction of our statutes. Henceforth, AECC should regard itself as subject to the jurisdiction of this Commission and within thirty days shall file with the Secretary its schedules and tariffs for approval pursuant to applicable law.

BY ORDER OF THE COMMISSION

This 2nd day of November, 1979.

W.M. Norton, Jr., Chairman
Robert C. Downie, Commissioner
John C. Pickett, Commissioner

(Certificate of Service Omitted in Printing)

IN PULASKI COUNTY CIRCUIT COURT

ANSWER OF ARKANSAS PUBLIC SERVICE COMMISSION

Filed February 21, 1980
(Title Omitted in Printing)

ANSWER

The Arkansas Public Service Commission (PSC), for its answer to the Petition for Review filed in this case by Arkansas Electric Cooperative Corporation (AECC), states:

(1) The PSC admits the veracity of the statements made in paragraphs one (1) through six (6), inclusive, of AECC's Petition for Review.

(2) The PSC denies each and every material allegation contained in paragraph seven (7) of the aforesaid Petition.

(3) Arguing in the affirmative, the PSC states that Order No. 2, made and entered on November 2, 1979, in Docket No. U-2992, is lawful, and does not violate any right of AECC under the laws of the United States of America or the State of Arkansas.

(4) The PSC further states that, in rendering the aforesaid Order, it regularly pursued its statutory authority, and that its findings as to the facts were, and are, based on substantial evidence found in the record of the case.

WHEREFORE, the Arkansas Public Service Commission respectfully requests that the Petition for Review of Arkansas Electric Cooperative Corporation be denied, or in the alternative, that upon review of the record in this case, the Order of the Arkansas Public Service Commission be approved and affirmed by this Court in all respects.

Respectfully submitted,

ARKANSAS PUBLIC SERVICE COMMISSION

/s/ By Robert H. Wood, Jr.
ROBERT H. WOOD, JR.
Assistant Counsel

(Certificate of Service Omitted)

SUPREME COURT OF ARKANSAS

No. 80-313

Opinion Delivered June 22, 1981

Arkansas Public Service Commission ..... *Appellant* Appeal from Pulaski County Circuit Court;

V. No. 80-313

Arkansas Electric Cooperative Corporation..... *Appellee* Perry V. Whitmore, *Judge*

DARRELL HICKMAN, Associate Justice

In 1979 the Public Service Commission decided to exercise jurisdiction over the rates and charges of the Arkansas Electric Cooperative Corporation.

The hearing preceding the order and the issues on appeal form only one question, whether the Commission is attempting to regulate wholesale interstate sales of electricity. The Commission concluded that it was not and could, therefore, assume jurisdiction.

Arkansas Electric Cooperative Corporation was formed to serve its seventeen members who are all Arkansas electric cooperatives. The only Arkansas cooperative that is not a member is one located at Newport, Arkansas. The appellee corporation was formed by the seventeen cooperatives so that the customers of the cooperatives could be better served; borrowing and purchasing power are more economical through a joint effort.

The appellee generates some of its electricity and buys the remainder from utility companies located in Arkansas. Apparently the appellee sells some of its electricity to these same utility companies when there is a surplus of energy. Other than those sales, all the power generated and bought by the appellee is sold to the seventeen Arkansas cooperatives. It is conceded that these cooperatives must buy the power and that the rate is determined by the appellee. It is not a negotiated rate and the rate is not regulated by any state or federal agency.

The PSC decided that it could exercise jurisdiction over those sales which were "essentially local." In its order the PSC said, "This Commission would not attempt to regulate the rate at which AECC purchases power in interstate commerce and that rate, of course, must act as a base for the price at which it resells that power to its members."

The corporation appealed the order to circuit court and the court reversed the Commission's decision. The court found that the sales of the corporation were wholesale sales in interstate commerce over which the PSC had no jurisdiction.

We find that the Commission had the authority by Arkansas statutes to exercise jurisdiction and that this authority is neither preempted by any federal law nor prohibited by the Commerce Clause of the United States Constitution.

The Arkansas statutes give the Commission the authority over public utitlies and the appellee is such a utility. *See* Ark. Stat. Ann. §73-201, et seq. (Repl. 1979). There are no exceptions for regulating wholesale sales. Ark. Stat. Ann. §73-202(a) (Repl. 1979).

The Commission concedes it cannot regulate wholesale sales in interstate commerce and contends that it has no intention of doing so. The Appellee cites authority that the Commission's order will do just that.

The distinguishing features in this case are as follows: The appellee is an Arkansas corporation formed for the purpose of serving seventeen Arkansas cooperatives. While it may incidentally and from time to time buy or sell electricity that may cross a state line, that is not its purpose. The utility companies that it buys from and sells surplus electricity to do serve customers in other states. Those are Arkansas Power & Light Co., which is a part of Middle South Utilities, Southwest Electric Power Co., and Southwestern Power Administration.

But the Commission found:

> ...AECC's business, indeed its very reason for existence, is the generation, purchase and transmission of electricity for and to its members, seventeen Arkansas electricity distribution cooperatives, who retail the electricity to their members in this State.

The appellee cites several cases as authority for its position. They are all distinguishable. *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83

(1927) is not controlling because in that case a Rhode Island utility company had a wholesale customer in Massachusetts. The court found the regulation by Rhode Island was not local but essentially national. The Court prevented Rhode Island from setting the rate. The appellee in this case exists to serve seventeen Arkansas cooperatives; it sells to none in other states.

The case of *Federal Power Commission v. Southern California Edison Co.*, 376 U.S. 205 (1965) is not controlling because that case interpreted the Federal Power Act and did not involve a cooperative. The Federal Power Commission took jurisdiction over wholesale rates charged by Edison, a California utility company to the city of Colton, which is also in California. A small amount of power sold by Edison originated in other states. This case does not control because it concerned an interpretation of the Federal Power Act. The Federal Power Commission has held that the Federal Power Act does not apply to cooperatives financed by the Rural Electrification Administration. *Re Dairyland Power Cooperative*, 67 PUR 3d340 (1967). The appellee concedes that the Federal Power Commission has not attempted to regulate its rates.

Tri-State Generation & Transmission Association v. Public Service Commission, 412 F.2d 115 (10th Cir. 1969) is not controlling because of distinguishing facts. Cooperatives in three states, Colorado, Wyoming, and Nebraska, formed a corporation just like the appellee. The Circuit Court of Appeals found the Wyoming Public Service Commission had prevented the Wyoming cooperative from paying contractual obligations to Tri-State which imposed a burden on interstate commerce. The appellee consists of cooperatives only in Arkansas and there is no evidence of a burden on interstate commerce.

In *Missouri v. Kansas Natural Gas Co.*, 265 U.S. 298 (1924), Missouri sought to regulate a situation where power originating in Oklahoma passed through Kansas and was

sold in Missouri. The Court held that the sale of this power was "an inseparable part of a transaction in Interstate Commerce — not local, but essentially national in character..." In distinguishing this case, the appellant Commission found:

> ...[I]t seems to us that the rates and charges of AECC that could effectively be regulated by this Commission are for transactions essentially local in character. Unlike *Kansas Gas*, [*Missouri v. Kansas Natural Gas Co.*, 265 U.S. 98 (1924)] which sold in an open interstate market, AECC exists to serve its members. Its transactions with them do not constitute "an unbroken chain, fundamentally interstate from beginning to end." Those transactions begin and end here in Arkansas. This service is hardly "of the character which require(s) general and uniform regulation of rates by Congressional action." Unlike the Narragansett Company, AECC does not serve customers in other states whose authorities might retaliate, to the detriment of interstate commerce. Unlike Rhode Island, this Commission does not seek to regulate, nor do we read our statutes as requiring us to regulate, interstate transactions of AECC, if there be any. If our regulation of rates charged to local customers has an "effect" unto interstate commerce, it can only be incidental, given a continuation of the present circumstances and policies of the company, which there is no reason not to expect. (That issue, however, can properly be dealt with only when and if it arises.) Nor does it matter that AECC's transactions with its members may be characterized as wholesale, for, as the Court said in *Attleboro*, [*Public Utilites Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927)] the test "is not the character of the general business...but whether the particular business which is regulated is essentially local or national in character." The particular business this Commission must regulate, between AECC and its members, is decidedly local, having its paramount impacts and consequences in Arkansas and having little or no relation to any other place.

The hearing did not delve into whether the appellee had been fair in its charges to its seventeen members. The only suggestion that the appellee's costs might be excessive was a reference to the fact that the appellee had thirty-four board members who met once a month and received $75.00 per diem for that meeting.

We find the appellant has the authority to take jurisdiction as it proposes and reverse the judgment of the circuit court.

Reversed.

Holt and Dudley, JJ, dissent.
George Rose Smith not participating.

SUPREME COURT OF ARKANSAS

No. 80-313

Opinion Delivered June 22, 1981

Arkansas Public Service Commission, *Appellant*

V.

Arkansas Electric Cooperative Corporation, *Appellee*

Appeal from Pulaski Circuit Court

Perry V. Whitmore, *Judge*

Dissenting Opinion

ROBERT H. DUDLEY, Associate Justice

Appellee has two sources of electric power. One is from generating plants located in Arkansas. The other is from purchasing electricity from Southwest Electric Power Company, Southwestern Power Administration, Arkansas Power & Light Company and Ark-Mo Power Company. This purchased power is generated at facilities located in Oklahoma, Missouri, Texas or Arkansas and is transmitted

to appellee from multi-state integrated systems or grids so that it is impossible to identify the generating facility which produced any particular energy.

Appellee sells power to A.P. & L. and to S.P.A. That power goes into multi-state grids or intergrated systems maintained by those purchasers and may be transmitted and consumed in Oklahoma, Missouri, Texas or Arkansas.

Appellee is engaged in interstate commerce. The purchasing from interstate sellers of some of the power which it, in turn, sells to its member cooperatives and to other purchasers is the same sort of transaction involved in the case of *Tri-State Generation & Transmission Ass'n, Inc. v. Public Service Commission of Wyoming*, 412 F.2d 115 (10th Cir. 1969). Tri-State was a nonprofit cooperative corporation as is appellee. Tri-State had a 28 R.E.A. cooperative members in three states who sold electricity at retail, while appellee has 17 R.E.A. cooperative members in Arkansas who sell electricity at retail. In *Tri-State*, the 28 member cooperatives were subject to regulation by the states, and in this case the 17-member cooperatives are regulated by the appellant P.S.C. The Tenth Circuit Court of Appeals held that Tri-State was clearly engaged in interstate commerce and the Wyoming P.S.C. action patently *had the potential of interfering with interstate commerce.* Likewise, appellee is clearly engaged in interstate commerce, and the P.S.C. action patently has the potential of interfering with interstate commerce. The majority opinion dismisses *Tri-State* by stating it "is not controlling because of distinguishing facts." Even the P.S.C. does not go that far as the Commission order states: "In candor, we should add that, for the reasons stated in the dissent therefrom, we do not think *Tri-State* was correctly decided..." and also that the P.S.C. will not nullify appellee's "ability to pass on the cost of purchased power to its members, as Wyoming seemingly did or was perceived by the Court of Appeals to have potentially done."

There are constitutional limitations upon state regulation of interstate commerce. In *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Company*, 273 U.S. 83 (1927), a Rhode Island company sold electricity at wholesale to a Massachusetts company. The Supreme Court denied Rhode Island the power to regulate the transaction for the sale of energy at wholesale. This was in 1927, before Congress had passed the Federal Power Act or any similar pre-emption statute, and the Court ruled that since the sale was of concern to both Rhode Island and Massachusetts it was "national in character" and not subject to state regulation. Consequently, "if such regulation is required it can only be attained by the exercise of power in Congress." Hence, the commerce clause is a limitation upon state power, whether or not Congress has chosen to regulate.

Congress undertook federal regulation through the Federal Power Act in 1935 and the Natural Gas Act in 1938. The premise on which Congress acted was that constitutional limitations upon state regulatory power made federal regulation essential if major aspects of interstate transmission and sale were not to go unregulated. "What Congress did was to adopt the test developed in the *Attleboro* line which denied state power to regulate a sale 'at wholesale to local distributing companies' and allowed state a regulation of a sale at 'local retail rates to ultimate consumers.'" *Federal Power Commission v. Southern California Edison Co., et al*, 376 U.S. 205 at 214 (1964), discussed in treatises and articles as the "Colton case."

In the *Colton* case, supra, Southern California Edison Company, a public electric utility company, operating in central and southern California, sold energy only to customers in its California territory. These customers included the City of Colton, which used some of the power for municipal purposes but resold the bulk of the power to residential and commercial customers. The California

Public Service Commission had exercised jurisdiction over the Edison-Colton energy transaction for years. The Federal Power Commission asserted jurisdiction and ultimately the Supreme Court of the United States ruled that the state could not regulate this transaction and that the Federal Power Commission could.

The majority inferentially concedes that the P.S.C. cannot regulate wholesale sales in interstate commerce. To avoid this issue, and the *Colton* case, the majority goes outside the abstracts submitted in this case, goes to the record to reverse a trial judge, and cites a footnote to the order stating that there will be no attempt to regulate interstate commerce. However, the ordering clause of the decree provides, "Henceforth, A.E.C.C. should regard itself as subject to the jurisdiction of this Commission and within thirty days shall file with the Secretary its schedules and tariffs for approval pursuant to applicable law."

Even if it should attempt to regulate only intrastate sales it would be beyond the reach of the P.S.C. for, as stated, the regulation of the sale of electric energy at wholesale patently has the potential of interfering with interstate commerce.

The majority opinion also states that power occasionally ends up in another state, indicating this is a local operation. Yet the P.S.C. has never supplied one single figure to set out percentages of interstate versus intrastate power. Yet it is certain that interstate and intrastate power comes and goes by interstate transmission grids as appellee has very little transmission capability of its own. Even so, that is not of great significant for the Supreme Court in the *Colton* case ruled out any case by case impact analysis deciding this type of case:

> "...In short, our decisions have squarely rejected the view of the Court of Appeals that the scope of the FPC jurisdiction over interstate sales of gas or

> electricity at wholesale is to be determined by a case-by-case analysis of the impact of state regulation upon the national interest. Rather, Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary such case by case analysis..." 376 U.S. 205, at 215.

That bright line is that states may not regulate interstate sales of electricty at wholesale to local distributing companies, but states may regulate rates at local retail to ultimate consumers.

The appellant contends that the Federal Power Act does not apply to electric cooperatives. This is not a determining factor for the commerce clause is a limitation upon state power whether or not Congress has chosen to regulate. However, it is worth examining. The material facts in this case are the same as those set out in *Salt River Project Agricultural Improvement and Power District v. Federal Power Commission*, 391 F.2d 470 at 473 (D.C. Cir. 1968). that court observed:

> Though REA regulation and supervision of cooperatives are, in many respects, far more comprehensive than those which the Federal Power Commision exercises over investor-owned utilities, there are certain areas, such as rate-making, where the cooperatives enjoy a freer hand. But it is in these areas that, by their structural nature, the cooperatives are effectively self-regulating. They are completely owned and controlled by their consumer-members, and only consumers can become members. They are non-profit. Each member has a single vote in the affairs of the cooperative, and service is essentially limited to members. No officer receives a salary for his services and officers and directors are prohibited from engaging in any transactions with the cooperative from which they can earn any profit.

The above paragraph, with an additional factor, is applicable to the present case. The additional factor is that much of the energy generated by appellee is sold to its owners, the 17-member cooperatives, who are fully regulated by appellant. The member cooperatives cannot pass on any increases in rates without appellant's approval. The fact that the Federal Power Act does not apply is insignificant.

Finally, there is no practical reason for the P.S.C. to regulate this non-profit wholesale cooperative. It is simply an additional layer of governmental regulation.

I dissent.

IN THE ARKANSAS SUPREME COURT
PETITION FOR REHEARING

Filed July 9, 1981
(Title Omitted in Printing)

GROUNDS RELIED UPON

THE COURT ERRED IN HOLDING THAT THE ARKANSAS PUBLIC SERVICE COMMISSION'S EXERCISE OF JURISDICTION OVER ARKANSAS ELECTRIC COOPERATIVE CORPORATION'S WHOLESALE RATES IS A CONSTITUTIONALLY VALID APPLICATION OF ARK. STAT. ANN. SEC. 73-202a.

The principal error committed by both the Arkansas Public Service Commission ("PSC") and the majority opinion of this Court is the failure to recognize that the analysis by the United States Supreme Court in the *Colton* case, *Federal Power Commission v. Southern California Edison Company*, 376 U.S. 205, 84 S.Ct. 644, 11 L.Ed.2d 638 (1964), is controlling here. The *Colton* decision is dismissed by both the PSC and this Court on the basis that it interpreted the Federal Power Act, and did not involve a

cooperative. While both those statements are correct, they do not detract from the applicability of *Colton's* principles of constitutional interpretation to this case.

The key is that the Federal Power Act, by its terms, sought to regulate (with certain stated exceptions) all that Congress could constitutionally regulate. Section 201 of the Federal Power Act provides, in pertinent part:

> "(a) It is hereby declared that . . . Federal regulation of . . . the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States."

The Court in *Colton* held that the F.P.C. had jurisdiction of "all sales of electric energy at wholesale in interstate commerce not expressly exempted by the Act itself, and that the F.P.C. properly asserted jurisdiction of the Edison-Colton sale." 376 U.S. 205, at 210.

Thus, a determination by the Supreme Court of the extent of regulation properly imposed by the Federal Power Act is necessarily a determination of the extent to which Congress may regulate. And that which Congress may regulate (whether Congress exercises the power or not), may not be regulated by the States.

Stated another way, the decision that the Federal Power Commission could regulate Southern California Edison was also a decision that the State of California could *not* regulate Southern California Edison. There can be no hiatus here; if a transaction is such that Congress may constitutionally regulate it, then it necessarily is beyond the power of the States to regulate. The transaction falls either on the "States may regulate" side of the line, or it doesn't.

The reliance of the majority on the findings of the Public Service Commission that it does not intend to

"regulate interstate transactions of AECC" and will only regulate "business (which) is decidedly local" is exactly the same argument used by the Court of Appeals in the *Colton* case and which was *expressly rejected* by the U.S. Supreme Court.

The Court in the *Colton* case was very explicit in reaffirming the holding in Public Utilities Commission of *Rhode Island v. Attleboro Steam & Electric Company*, 273 U.S. 83, 47 S.Ct. 294, 71 L.Ed. 549 (1927) that states *do not have jurisdiction* over wholesale sales of electricity in interstate commerce. Footnote 8 to the *Colton* opinion amplifies this with the following quote from Senate hearings:

> The general solicitor of the National Association of Railroad & Utilities Commissioners said during the House hearings: "That case (Attleboro) has been accepted by everybody as establishing . . . the fact that the State cannot regulate wholesale transactions, although it can regulate retail service and rate." Hearings on H.R. 5423, supra, p. 1657. At the Senate hearings he said: "The second part of the bill (§201 (b)) provides for regulation by the Federal Government of wholesale transactions in electric power. Those are transactions which the United States Supreme Court has held are beyond the reach of the States under the Constitution. The States have long regulated the rates charged by the local distributing companies to consumers; but they cannot reach the interstate producer supplying the distributing company." Hearings on S. 1725, supra, pp. 756-757. "It therefore follows that if there is to be any regulation of the wholesale part of the electric and gas business which passes over State lines it must be supplied by the Federal Government." Id., p. 768.

The sales by AECC and those by Edison in the *Colton* case are exactly the same. In both instances, some of the energy marketed came from out of state; Edison's from the

Department of Interior out of Hoover Dam, and AECC's from the Department of Interior (now DOE) out of dams in Missouri, Oklahoma and Arkansas, and from other utilities.

In both instances, the sales are similar: Edison sold only to customers in southern California; AECC sells primarily to customers in Arkansas, though it does also sell to SPA, AP&L and SWEPCO.

Under the authority of *Colton*, the sales of AECC and Edison are both "sales for resale in interstate commerce."

For this Court to say that such sales for resale in interstate commerce are subject to jurisdiction of the State of Arkansas is diametrically opposed to the entire line of cases from *Attleboro to Colton*.

In short, the line of decisions and congressional action have followed this route:

(1) *Attleboro* held that states have no power to regulate in this area.

(2) Congress passed the Federal Power Act to fill the void resulting from *Attleboro*.

(3) *Colton* clarified that all sales for resale were in interstate commerce if any of the electricity passed over state lines and there was to be no case by case analysis. In other words, the entire field was preempted and states had no jurisdiction.

(4) The FPC in *Dairyland* decided that it was the intent of Congress that the Rural Electrification Administrator should exercise this jurisdiction since he "has virtually absolute discretion and exercises extensive and rigid supervision and control over its cooperative borrowers". This decision by the FPC dealt with which of two federal agencies would fill the void as to cooperatives.

FPC deferred to REA. There was never any question of state jurisdiction because everyone recognized *Attleboro-Colton* had denied such authority to the states.

It is beyond question that Congress could, pursuant to the *Colton* analysis, regulate AECC's wholesale sales to its member cooperatives; that Congress has not done so, or has done so only to the extent provided in the Rural Electrification Act, does not affect the analysis. Congress has the power to regulate; the state of Arkansas, therefore, does not.

The majority opinion quotes with approval the language of the PSC opinion stating that it does not matter that AECC's sales to the cooperatives may be characterized as "wholesale" sales. This is directly contrary to the ruling in *Colton*, which specifically held that such sales could be regulated only by Congress, and were beyond the reach of state regulation.

Other points in the majority opinion should be briefly addressed.

The majority state that the rate AECC charges its member cooperatives is "not a negotiated rate." Since the 34-member Board of Directors of AECC comprises only representatives of its member cooperatives (two representatives of each), it is true that the member cooperatives do not "negotiate" the rate with AECC; they actually set the rate. It could be inferred from the majority opinion that AECC imposes rates on its members, who have no recourse, but this would be obviously erroneous. The members have no need to negotiate the rate, since they, and only they, actually determine what the rate will be.

Since the PSC has a clear and unquestioned power to indirectly, but effectively, control AECC's rates through the rate-making process imposed upon each of the seventeen member cooperatives, there is no practical

reason for the PSC to impose what is accurately characterized by the dissenting opinion as "an additional layer of governmental regulation." The end result is additional expense caused by an unnecessary regulatory procedure, and the projection of rates which must necessarily be higher because of regulatory lag time; additional expense which finds its way eventually into the rates charged the ultimate consumers. The only persons benefiting from such a procedure are the employees of the regulatory body, and the lawyers and engineers who must be employed by AECC in connection with the unneeded rate-making process.

CONCLUSION

The decision of the trial court should be affirmed, since it would be a constitutionally invalid application of Ark. Stat. Ann. Sec. 73-203a to give the PSC jurisdiction over AECC's wholesale rates.

* * *

IN THE ARKANSAS SUPREME COURT
RESPONSE TO PETITION FOR REHEARING

Filed July 13, 1981
(Title Omitted in Printing)

Comes now the Arkansas Public Service Commission and for its Response to Arkansas Electric Cooperative Corporation's Petition for Rehearing states that:

(1) AECC alleges this Court's decision violates *Federal Power Commission v. Southern California Edison Co.*, 376 U.S. 205, 84 S.Ct. 644, 11 L.Ed.2d 638 (1964) (hereinafter *Colton*). The applicability of *Colton* was discussed previously by the parties in their briefs, however, and is, therefore, not a proper basis for a rehearing. *Rules of Supreme Court*, Rule 20 (g).

(2) The result in *Colton, supra*, is not inconsistent with the decision here. *Colton* interpreted the Federal Power Act in resolving a jurisdictional dispute between the FPC and the State of California. State jurisdiction was denied there because the FPC was found to have jurisdiction under the FPA. No allegation of FPC jurisdiction is made here.

(3) AECC would deny state power to enact reasonable, non-discriminatory regulations only indirectly affecting interstate commerce. This ignores the proper distribution of power within our federal system. *See, Cities Service Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179, 71 S.Ct. 215, 95 L.Ed. 190 (1950); *Milk Control Board v. Eisenburg Farm Products*, 306 U.S. 346, 59 S.Ct. 528, 83 L.Ed. 752 (1939); *South Carolina Highway Dept. v. Barnwell Brothers, Inc.*, 303 U.S. 177, 58 S.Ct. 510, 82 L.Ed. 734 (1938). *See also, Re East Kentucky Power Cooperative, Inc.*, 37 PUR4th 420 (Ken. 1980) (order of state commission fixing rates for a wholesale cooperative).

(4) Direct regulation of AECC would not be simply another layer of governmental regulation, but would supplant Commission attempts to regulate AECC indirectly by regulating individually the member cooperatives. Regulation of AECC would lead to partial deregulation of the local cooperatives.

WHEREFORE, the Commission prays that for the preceeding reasons, AECC's Petition for Rehearing be denied.

* * *

(CERTIFICATE OF SERVICE OMITTED)

Motion to Dismiss or Affirm

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FILED
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ALEXANDER L. STEVAS
CLERK

NO. 81-731

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1981

ARKANSAS ELECTRIC COOPERATIVE CORPORATION,

Appellant,

v.

ARKANSAS PUBLIC SERVICE COMMISSION,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF ARKANSAS

MOTION TO DISMISS

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P.O.— SC-82-7113 50 COPIES

QUESTION PRESENTED

Whether the Commerce Clause of the United States Constitution prohibits the Arkansas Public Service Commission from regulating the rates at which Arkansas Electric Cooperative Corporation sells electricity to local distribution cooperatives.

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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1981

ARKANSAS ELECTRIC COOPERATIVE CORPORATION,

Appellant,

v.

ARKANSAS PUBLIC SERVICE COMMISSION,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF ARKANSAS

MOTION TO DISMISS

Pursuant to Rule 16(b) and (d) of the Revised Rules of this Court, Appellee moves that this appeal be dismissed.

JURISDICTION

This is an appeal from a decision of the Arkansas Supreme Court. The decision of the Arkansas Supreme Court was entered on June 22, 1981. Appellant's Petition for Rehearing was denied on July 20, 1981. Appellant's Notice of Appeal to this Court was filed October 5, 1981. Appellant's Jurisdictional Statement was filed October 14,

1981. Appellant seeks review of the result below under 28 U.S.C. §1257(2).

STATUTES AND ORDERS INVOLVED

The statutes involved (Ark. Stat. Ann. §73-201, *et seq*) are reproduced in the Jurisdictional Statement, pp. 2-3. The Constitutional provision involved (United States Constitution, Art. I, §8, cl. 3) is reproduced in the Jurisdictional Statement, p. 2. The administrative orders and judicial opinions involved are reproduced in the Appendix to the Jurisdictional Statement, pp. A-1 ff. Sections 201(a)(b)(c)(d) and (e) of the Federal Power Act (16 USC §824(a), *et seq*) are set out in an Appendix to this Motion to Dismiss.

STATEMENT OF THE FACTS

On December 11, 1978, the Appellee, the Arkansas Public Service Commission, gave notice that it would hold on January 22, 1979, a public hearing to determine whether it had jurisdiction over sales of electricity by Arkansas Electric Cooperative Corporation to local distribution cooperatives. AECC was created by the local cooperatives to provide them with wholesale power.

At the hearing, AECC and certain member cooperatives expressed their opposition to the proposed extension of Commission jurisdiction. The Staff of the Commission took the position that jurisdiction over AECC was permissible.

On November 2, 1979, the Commission issued an order asserting jurisdiction over AECC's sales to member cooperatives and instructing AECC to file tariffs within

thirty days. AECC unsuccessfully petitioned for a rehearing, and, on January 25, 1980, filed a Petition for Review in the Pulaski County Circuit Court.

On November 4, 1980, the Circuit Court issued an order reversing the Commission. The Commission appealed to the Arkansas Supreme Court. On June 22, 1981, the Arkansas Supreme Court, with two justices dissenting and one not participating, reversed the decision of the Circuit Court and held Ark. Stat. Ann. §73-201, *et seq* was a constitutional grant of authority to the Commission over AECC's rates. A Petition for Rehearing was denied on July 22, 1981. On October 5, 1981, AECC filed a Notice of Appeal to this Court. On October 14, 1981, AECC docketed this appeal.

ARGUMENT

Arkansas Electric Cooperative Corporation (hereinafter AECC) is an Arkansas corporation organized by seventeen local electric cooperatives to provide them with electric power at wholesale rates.[1] The authority of the Arkansas Public Service Commission (hereinafter the Commission) to regulate the rates at which AECC sells wholesale electric energy to these local distribution cooperatives was upheld by the Arkansas Supreme Court in *Arkansas Public Service Commission v. Arkansas Electric Cooperative Corporation*, 273 Ark. 170, 618 S.W.2d 151 (1981), over AECC's objection that state regulation of its rates would violate the Commerce Clause of the United States Constitution.[2] AECC, once again seeking in the Commerce Clause immunity from rate regulation, now asks this Court to reverse the result below. The Commission must once again respectfully disagree with the expansive view advanced by AECC of the scope of exclusive federal jurisdiction over commercial activities. The Commission takes the position that regulation of essentially local rates is a valid exercise of the state police power.[3] For this reason, and because AECC has failed to present in its appeal a substantial

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[1]Both AECC and its member cooperatives were organized pursuant to Ark. Stat. Ann. Sections 77-1101, **et seq** (Repl. 1957).

[2]The Commerce Clause provides that:

> The Congress shall have power . . . To regulate Commerce with foreign nations and among the several states. . . . United States Constitution, Article I, §8, Cl. 3.

[3]Chief Justice Taney in **The License Cases**, 5 How. 504, 12 L.Ed. 256 (1847) wrote: "(T)he police powers of a state are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions." **Id.** at 584.

federal question, the Commission believes this appeal should be dismissed.

The purpose of the Commerce Clause was to "create an area of free trade among the several states." *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157, 74 S.Ct. 396, 98 L.Ed. 583, *reh. den.,* 347 U.S. 931, 74 S.Ct. 528, 98 L.Ed. 1083 (1954). Consistent with this purpose, Congress is acknowledged to possess exclusive jurisdiction over interstate commerce only where the Constitution so provides or where a national interest in uniformity of regulation so demands. *See, Goldstein v. California,* 412 U.S. 546, 93 S.Ct. 2303, 37 L.Ed. 163 (1973); *See also, Cooley v. Board of Wardens,* 12 How. 299, 13 L.Ed. 996 (1851). Exclusive state jurisdiction over commerce is limited to those activities completely within a single state and affecting no other state. *Gibbons v. Ogden,* 9 Wheat 1, 6 L.Ed. 23 (1824). Where federal jurisdiction exists but is not exclusive, the state and federal governments exercise concurrent jurisdiction. Until preempted by Congressional action, the states, in this area, are free to enact reasonable, non-discriminatory regulations even though interstate commerce may be affected. *Head v. New Mexico Board of Examiners in Optometry,* 374 U.S. 424, 83 S.Ct. 1759, 10 L.Ed. 2d 983 (1963) (permitting state regulation of eyeglass sales); *Huron Portland Cement Co. v. Detroit,* 362 U.S. 440, 4 L.Ed. 2d 852, 80 S.Ct. 813 (1960) (upholding local regulation of pollution by interstate shippers); *South Carolina State Highway Dept. v. Barnwell Brothers,* 303 U.S. 177, 58 S.Ct. 510, 82 L.Ed. 734 (1938) (allowing state regulation of truck weights and widths).

The concurrent power of the states to fix the intrastate rates of even interstate public utilities and common carriers

has been well established by the prior decisions of this Court. For example, while the states may not set rates for the interstate transportation of passengers or goods, the movement of either between two points in a single state is subject to the ratemaking authority of that state. *Wisconsin Railroad Commission v. Chicago, B. & Q. Railroad Co.*, 257 U.S. 563, 42 S.Ct. 232, 66 L.Ed. 371 (1922). As this Court observed in *The Minnesota Rate Cases*, 230 U.S. 352, 33 S.Ct. 729, 57 L.Ed. 1511 (1913), reasonable intrastate rates could not be held a direct burden on interstate commerce. The commingling of interstate with intrastate commerce might justify federal regulation of both, but, until Congress acted, the states could control the latter.

State power over the intrastate rates of a public utility was again recognized by this Court in *Cities Service Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179, 71 S.Ct. 215, 95 L.Ed. 190 (1950). There an order by the Oklahoma Corporation Commission fixing a minimum wellhead price for natural gas was upheld, even though ninety percent of the gas eventually left the state. Justice Clark, writing for the majority, rejected the argument, similar to the one advanced here by AECC, that the Commerce Clause itself precluded state regulation:

> The Commerce Clause gives to the Congress a power over interstate commerce which is both paramount and broad in scope. But due regard for state legislative functions has long required that this power be treated as not exclusive. *Cooley v. Port Wardens*, (U.S.) 12 How. 299, 13 L.Ed. 996 (1851). It is now well settled that a state may regulate matters of local concern over which federal authority has not been exercised, even

> though the regulation has some impact on interstate commerce. *Parker v. Brown*, 317 U.S. 341, 87 L.Ed. 315, 63 S.Ct. 307 (1943); *Milk Control Board v. Eisenberg Farm Products*, 306 U.S. 346, 83 L.Ed. 752, 59 S.Ct. 528 (1939); *South Carolina Highway Dept. v. Barnwell Brothers*, 303 U.S. 177, 82 L.Ed. 734, 58 S.Ct. 510 (1938). *Id.* at 186.

State regulations would survive judicial scrutiny, Justice Clark added, if they were nondiscriminatory and safeguarded a valid state interest which outweighed any national interest in the prevention of state control. The order of the Oklahoma Commission drew no distinction between gas destined for out-of-state consumption and gas that would remain in Oklahoma. Recognizing also that the proper pricing of natural gas was necessary to prevent the premature exhausation of an important natural resource, the Court found no conflict between Oklahoma's interest in conservation and the national welfare.[4]

The case at bar comes easily within the holding of *Cities Service Co., supra,* since AECC, unlike the gas producers in that case, sells electricity almost entirely for local consumption. The rates the Commission seeks to set, furthermore, are for sales to Arkansas cooperatives for resale to their customers, while in *Cities Service Co., supra,* Oklahoma was allowed to regulate rates for sales to intrastate pipeline companies for resale throughout the United

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[4]This Court has recognized **Cities Service Co., supra,** dealt only with constitutional questions and did not involve application of the Natural Gas Act. **Northern Natural Gas Co. v. State Corporation Commission,** 372 U.S. 84, 93 S.Ct. 646, 9 L.Ed 2d 601 (1963). The Commission does not suggest Congress could not preempt the kind of state regulation upheld in the earlier case.

States. Like Oklahoma, however, Arkansas has a legitimate interest in the proper pricing of its energy resources.

AECC cites *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Company*, 273 U.S. 83, 47 S.Ct. 294, 71 L.Ed. 549 (1927) and *Federal Power Commission v. Southern California Edison Company* (the *Colton* case), 376 U.S. 205, 84 S.Ct. 644, 11 L.Ed. 2d 638 (1964) in support of its position. The opinion of the Arkansas Supreme Court correctly distinguished these cases from the present case.

In *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Company, supra*, Rhode Island was held to lack the power to fix the rates at which a Rhode Island utility could sell electricity to a Massachusetts utility. In reaching its decision, the Court considered two earlier cases, *Pennsylvania Gas Co. v. Public Service Commission*, 252 U.S. 23, 40 S.Ct. 279, 64 L.Ed. 434 (1920), upholding a state's power to regulate gas sales to local customers, and *Missouri ex rel Barrett v. Kansas Natural Gas Co.*, 265 U.S. 298, 44 S.Ct. 544, 68 L.Ed. 1027 (1924), denying a state's power to regulate gas sales to distributing companies. The Court in *Attleboro* held *Kansas Natural Gas Co., supra*, controlling. Since both cases involved wholesale rates, AECC has concluded that its rates, which are also wholesale, must therefore be free from state regulation. A careful reading of *Attleboro* and a proper understanding of the Commerce Clause does not support this conclusion.

Attleboro recognized that prior cases had established the "essentially local" nature of a transaction as the prerequisite for the exercise of state power — not an arbitrary distinction between retail and wholesale purchases. The *Attleboro* opinion does read *Kansas Natural Gas Co., supra*,

to prohibit state control of "the sale of gas in wholesale quantities, not to consumers, but to distributing companies for resale", *id.* at 553, but immediately added this caveat:

> [W]here the transportation, sale and delivery constitute an unbroken chain, fundamentally interstate from beginning to end. . . .

The operations of AECC are simply not "fundamentally interstate from beginning to end," while the sale in *Attleboro* was conceded to be "a transaction in interstate commerce." *Id.* at 552. Similarly, the *Kansas Natural Gas Co.* case involved a Delaware corporation which bought gas in Oklahoma, then piped it through Kansas to Missouri, and made wholesale sales in both states. By comparison, AECC's operations are essentially local. Finally, AECC was organized to sell electricity to smaller cooperatives providing electricity to rural Arkansas, not to serve as part of a national system of power distribution. The following language from *Attleboro* contradicts the argument that the Commerce Clause protects all wholesale transactions from state regulation:

> The test of the validity of a state regulation is not the character of the general business of the company, but *whether the particular business which is regulated is essentially local* or national in character. *Id.* at 553. [Emphasis added]

AECC also argues that the *Colton* case, *supra*, upholding the jurisdiction of the Federal Power Commission over the wholesale rates of an investor-owned electric utility selling electricity only in California precludes state regulation of its own rates. While *Colton* is factually similar to the present case, it is not controlling. The issue

in *Colton* was the scope of the jurisdiction conferred on the FPC by the Federal Power Act, a statutory, rather than a constitutional, question.

In the *Colton* case, the Ninth Circuit Court of Appeals held that §201(a) of the FPA, giving the FPC jurisdiction over matters not subject to state regulation, prevented the FPC from regulating Southern California Edison's sales to the City of Colton.[5] The United States Supreme Court reversed, holding that §201(b) of the FPA, giving the FPC jurisdiction over all wholesale electric rates in interstate commerce, empowered the FPC to regulate the sales in question. The Court dismissed §201(a) as "merely a policy declaration . . . of great generality." *Id.* at 215. The Court, on the other hand, found in§201(b) a broad grant of power to the FPC. The Court did not hold that state regulation was improper for purposes of applying §201(a), but that §201(b) controlled the case and represented a legislative intent rejecting the view:

> [T]hat the scope of FPC jurisdiction over interstate sales of gas or electricity at wholesale is to be determined by a case-by-case analysis of the impact of state regulation upon the national interest. Rather Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary such case-by-case analysis. *Id.* at 215-216.

Aware of decisions such as *Attleboro,* Congress passed the FPA. Apparently to avoid embroiling the FPC in jurisdictional squabbles, a mechanical test of FPC jurisdiction was adopted: the FPC was to have jurisdiction of all

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[5]310 F.2d 784 (9th Cir. 1962).

wholesale transactions by utilities subject to its jurisdiction. The same test, the Commission submits, should not be used in determining a state's power under the Commerce Clause to regulate sales by suppliers like AECC, not subject to FPC jurisdiction.[6] There, a case-by-case analysis, though perhaps inefficient for administration of the FPA, is precisely the proper function of a reviewing court, and is in fact the way this Court has approached similar cases in the past.

The purpose of the Commerce Clause was to promote free trade among the states, not to arbitrarily allocate power among the state and federal governments, as AECC here seeks to do. Regulation of AECC's rates by the State of Arkansas poses no danger to interstate commerce. The result this Court reached in *Attleboro* was necessary to prevent states from seeking to subsidize local utility service by overpricing out-of-state sales. No out-of-state sales are involved here. In other Commerce Clause cases, state regulations falling on parties outside the state and hence unrepresented in the state's political processes, have been struck down. *See, Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767-68, n. 2, 65 S.Ct. 1515, 89 L.Ed 1915 (1945); *South Carolina State Highway Dept. v. Barnwell Brothers, supra*, n. 2. Here, the party on whom the burden of regulation falls, AECC, has access to the political process of Arkansas for protection of its interests.

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[6]The FPC (now the Federal Energy Regulatory Commission) does not regulate electric cooperatives. **Salt River Project Agricultural Improvement & Power District, et al, v. Federal Power Commission**, 391 F.2d 470 (D.C. Cir. 1968); **Re Dairyland Power Cooperative**, 37 FPC 12, 67 PUR 3d 340 (1967).

CONCLUSION

The prior decisions of this Court have clearly established that regulation of intrastate utility rates is within the power of the states until Congress occupies the field. The Commission respectfully urges this Court to dismiss AECC's appeal.

Respectfully submitted,

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Appendix

16 U.S.C. §824(a)-(e)

(a) It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydro-electric energy which is transmitted across a State line. The commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(c) For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate

commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) The term "sale of electric energy at wholesale" when used in this subchapter, means a sale of electric energy to any person for resale.

(e) The term "public utility" when used in this subchapter and subchapter III of this chapter means any person who owns or operates facilities subject to jurisdiction of the Commission under this subchapter.

Appellant's Brief

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No. 81-731

In the

Supreme Court of the United States

October Term, 1982

Arkansas Electric Cooperative Corporation,
Appellant,

V.

Arkansas Public Service Commission,
Appellee.

APPEAL FROM THE
SUPREME COURT OF ARKANSAS

BRIEF FOR APPELLANT

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QUESTION PRESENTED

Whether the Arkansas Public Service Commission's assertion of authority to regulate a portion of Arkansas Electric Cooperative Corporation's wholesale rates is a constitutionally valid application of Ark. Stat. Ann. §73-201 (1981), et. seq. (which grants the Arkansas Public Service Commission jurisdiction to regulate utility rates generally), in light of the Commerce Clause of Article I, §8, and the Supremacy Clause of Article VI, §2, of the United States Constitution.

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The majority and dissenting opinions of the Supreme Court of Arkansas (J.A. 65) are reported at 273 Ark. 170, 618 S.W.2d 151 (1981). The Arkansas Public Service Commission's order entered November 2, 1979 (J.A. 51) is not reported.

JURISDICTION

Appellant Arkansas Electric Cooperative Corporation (AECC) appeals from the final judgment of the Supreme Court of Arkansas holding that the Arkansas Public Service Commission (PSC) had authority under Arkansas statutes to exercise jurisdiction over a portion of AECC's wholesale rates, and that the PSC's exercise of that authority was neither pre-empted by Federal law nor prohibited by the Commerce Clause of the United States Constitution.

The judgment of the Supreme Court of Arkansas upholding the PSC's assertion of jurisdiction was delivered on June 22, 1981 (J.A. 65). A timely petition for rehearing was denied on July 20, 1981 (J.A. 81). Notice of appeal to this court was timely filed in the Supreme Court of Arkansas on October 5, 1981. (R. 130, Vol. II)

This appeal was docketed within ninety days from the denial of rehearing below. Jurisdiction of this court is invoked pursuant to 28 USC §1257 (2).

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, art. I, §8:

> The Congress shall have power . . . To regulate commerce with foreign nations and among the several states . . . .

United States Constitution, art. VI, §2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Rural Electrification Act, Title I, §4, ch. 432, 49 Stat. 1365 (1936) (Codified as 7 U.S.C. §904 (1978 & Supp. 1982):

Sec. 4. The Administrator is authorized and empowered, from the sums hereinbefore authorized, to make loans for rural electrification to persons, corporations, States, Territories, and subdivisions and agencies thereof, municipalities, peoples' utility districts and cooperative, nonprofit, or limited-dividend associations, organized under the laws of any State or Territory of the United States, for the purpose of financing the construction and operation of generating plants, electric transmission and distribution lines or systems for the furnishing of electric energy to persons in rural areas who are not receiving central station service, and loans, from funds available under theprovisions of Sections 903(d) and 903(e) of this title but without regard to the 25 per centum limitation therein contained, to cooperative associations and municipalities for the purpose of enabling said cooperative associations, and municipalities to the extent that such indebtedness was incurred with respect to electric transmission and distribution lines or systems or portions thereof serving persons in rural areas, to discharge or refinance long-term debts owed by them to the Tennessee Valley Authority on account of loans made or credit extended under the terms of the Tennessee Valley Authority Act of 1933, as amended [16 USC 831 et seq.]: *Provided*, That the Administrator, in making such loans, shall give preference to States, Territories, and subdivisions and agencies thereof, municipalities, peoples' utility districts, and cooperative, nonprofit, or limited-dividend associations, the projects of which comply with the requirements of this chapter. Such loans shall be on such terms and conditions relating to the expenditure of the moneys loaned and the security therefor as the Administrator shall determine and may be made payable in whole or in part out of the

income: *Provided, further,* That all such loans shall be self-liquidating within a period of not to exceed thirty-five years, and shall bear interest at the rate of 2 per centum per annum; interest rates on the unmatured and unpaid balance of any loans made pursuant to this section prior to September 21, 1944 shall be adjusted to 2 per centum per annum, and the maturity date of any such loans may be readjusted to occur at a date not beyond thirty-five years from the date of such loan: *And provided further,* That no loan for the construction, operation, or enlargement of any generating plant shall be made unless the consent of the State authority having jurisdiction in the premises is first obtained. Loans under this section and section 905 of this title shall not be made unless the Administrator finds and certifies that in his judgment the security therefor is reasonably adequate and such loan will be repaid within the time agreed. [1]

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[1] Amendments passed in 1973 and later changed the interest rates and other aspects of the loan program.

STATEMENT OF THE CASE

AECC is an electric cooperative corporation engaged exclusively in the generation, transmission and sale at wholesale of electric power and energy, mostly to its members, who are seventeen distribution (or "retail") electric cooperative corporations (J.S. App., p. 27a). The business and affairs of AECC are managed by a Board of Directors comprising thirty-four persons, two designated by each of the seventeen member cooperatives (J.A. 19). This board of member-designated directors determines the rates charged the member cooperatives for power and energy (J.A. 28).

AECC's primary purpose is to provide an economical and reliable supply of electric power and energy to the seventeen distribution or retail cooperatives who own and control AECC. The energy sold by AECC to its member cooperatives comes both from generating plants wholly or partially owned by AECC, and from a variety of sale or exchange agreements between AECC and other wholesalers of electric power and energy (J.A. 14, 15). Those wholesalers include Southwestern Electric Power Company (SWEPCO); Southwestern Power Administration (SPA); and Arkansas Power & Light Company (AP&L) (J.A. 15).

All three wholesalers with whom AECC contracts to obtain electric power and energy are integral parts of multi-state systems or grids with generating facilities in several states (J.A. 14, 15). The quantity of energy delivered to AECC at any given point may be and is precisely measured; however, since that energy is supplied from multi-state systems or grids which include many possible generating sources, the generating source of that energy cannot be ascertained (J.A. 39, 44); in certain instances, such as when the Flint Creek plant is out of service, energy supplied by SWEPCO necessarily comes from out of state. The reverse would be true with respect to the ultimate

consumption of energy delivered by AECC to these multi-state systems or grids; it may be transmitted within or outside the State of Arkansas and consumed within or outside the State of Arkansas, but it is impossible to determine which.

AECC makes no sales to any retail customer or any ultimate consumer of power (J.S. App., p. 27a). Most of its sales are at wholesale to its member cooperatives, who, in turn, distribute the energy to their members, the individuals and firms who are the ultimate consumers of the energy. The remainder of AECC's sales are also at wholesale, but to other utilities, and not to consumers (J.S. App., p. 27a).

On December 11, 1978, the PSC issued an order giving notice that it proposed to consider whether it had jurisdiction over the rates and charges made by AECC for power and energy furnished to its member cooperatives, and scheduled a hearing on this proposal (J.A. 3). On January 8, 1979, AECC filed its "Comments" wherein it stated: "The interstate transmission and sale of electricity at wholesale to local distribution cooperatives is not subject to state control of rates under the decisions of the United States Supreme Court in *Public Utilities Commission of Rhode Island v. Attleboro*, 273 U.S. 83 (1927), *FPC v. Southern California Edison Company*, 376 U.S. 205 (1964) (the Colton case)." (J.S. App., pp. 27a-28a). AECC acknowledged in the hearing that it was subject to PSC jurisdiction and regulation for other purposes, but not with respect to its wholesale rates (J.A. 43).

Following a public hearing, the PSC entered its order dated November 2, 1979, in which it acknowledged that some of AECC's purchased power originated outside Arkansas, and that some of the power it delivers to those suppliers is by them transmitted beyond the state of Arkansas; that AECC contended that its rates were beyond PSC jurisdiction because of federal law; and that it

disagreed with that position, ordering AECC to regard itself as subject to the jurisdiction of the PSC with respect to wholesale rates charged to its members, and to submit schedules and tariffs for approval. (A. 51-64).

When AECC applied for rehearing of the PSC order (J.S. App., p. 28a), and when it petitioned the Pulaski County Circuit Court to review the PSC's order (J.S. App., p. 29a), it specifically asserted that the PSC had erred as a matter of law in exercising jurisdiction over wholesale rates, since the federal government had exclusive authority to regulate wholesale rates in all cases except those which Congress had made explicitly subject to regulation by the states (J.S. App., p. 30a). The Pulaski County Circuit Court held that the PSC did not have jurisdiction over the rates in question, and reversed the PSC (J.S. App., p. 24a). The PSC then apealed to the Arkansas Supreme Court (R. 15, Vol. II).

AECC reiterated its constitutional arguments before the Arkansas Supreme Court, both in its appellee's brief, and in its petition for rehearing (J.A. 75). The Arkansas Supreme Court denied the petition for rehearing without opinion (J.S. App., p. 25a); however, it specifically held in its majority opinion that the PSC had authority to exercise jurisdiction over the rates in question, and that that authority "is neither preempted by any federal law nor prohibited by the Commerce Clause of the United States Constitution." (J.A. 65, at 67).

SUMMARY OF ARGUMENT

The PSC may not constitutionally assert jurisdiction over the wholesale rates charged by AECC for power and energy sold to its members, each of which is a distribution or retail cooperative. Even if Congressional silence is assumed, the PSC is attempting to regulate sales at wholesale in interstate commerce; such regulation is exclusively the province of Congress under the Commerce Clause (United States Constitution, Art. I, §8), and is therefore beyond the jurisdiction of any state. In addition, there is Congressional action in the field, the Rural Electrification Act, Title I, §4, ch. 432, 49 Stat. 1365 (1936) (codified as 7 USC §904 (1978 & Supp. 1982) [hereinafter cited as §4]; §4 and the supervision and control exercised by the Administrator occupy the field, and are not consistent and may conflict with state regulation of the rates in question.

First, if it is assumed, *arguendo*, that Congress has not acted and has remained silent with respect to regulation or supervision of wholesale rates, the line of cases decided by this court leading up to and following *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Company*, 273 U.S. 83 (1927), clearly establishes that a state may regulate sales of electric energy (or natural gas, which in many ways is very similar) at retail to ultimate consumers in that state, but that a state may not regulate bulk sales of energy at wholesale to a local distributor when the electric energy (or natural gas) has moved in interstate commerce. The total energy resources of AECC, whether generated at AECC's facilities or obtained from other wholesalers which are part of multi-state systems or grids, constitute a single, fungible, inextricably mixed pool of power. Energy sold by AECC cannot be identified or labeled with respect to its source of generation; it may have been generated in Arkansas by AECC, in Arkansas by one of AECC's suppliers, out of Arkansas by one of AECC's suppliers, or by any combination of those possibilities.

AECC's sales are sales at wholesale, and include energy which has moved in interstate commerce; the state of Arkansas is therefore prohibited by the Commerce clause from regulating those sales.

The conclusion that the PSC has no jurisdiction to regulate such rates is strongly supported by decisions of this Court which recognize that there was a gap in regulation created by the *Attleboro* line of cases. In a case remarkably similar on its facts to the instant case, except that it involved an investor-owned utility, it was held that sales at wholesale by Southern California Edison Company (Edison) were not subject to regulation by the state of California (and therefore were subject to Federal Power Commission (FPC) jurisdiction); those sales occurred entirely within the state of California, and included some small amount of energy which had been generated outside California. *Federal Power Commission v. Southern California Edison Company*, 376 U.S. 205 (1964) [hereinafter cited as *Colton*].

The PSC is also without jurisdiction to regulate such rates because Congress has passed legislation which occupies the field and, in a manner consistent with the purposes to be served by the act, fully and completely regulates and supervises such sales. This was done by the Rural Electrification Act, particularly §4. The attempted regulation of AECC's wholesale rates by the PSC is not consistent with the supervisory and regulatory scheme adopted by Congress and administered by the Rural Electrification Administration (REA), and may conflict with it.

The REA was established to make loans to cooperatives and others for the purpose of bringing electricity to rural America. The administrator is granted plenary authority by §4 of the act to make these loans under such terms and conditions relating to the expenditure and security of the

money as the Administrator may determine. The supervision and control exercised by the Administrator over the borrowing cooperatives is extensive. Regulation or supervision of rates which the borrowers charge for energy has been exercised, primarily for the purpose of insuring adequate security for the loans, pursuant to the statutory mandate.

The PSC was created to regulate utilities generally and to set rates not excessive to consumers, yet allowing a fair rate of return to the utility. This may at times be inconsistent and in conflict with REA's goal of making electricity available in rural areas and protecting the security of the loans it makes; the Administrator's judgment about rates which protect the security of REA's loans may conflict with the PSC's judgment concerning excessive rates to consumers. Congress has, therefore, pre-empted the field by establishing and granting to the REA power to supervise and control cooperatives who borrow from REA, and state regulation must therefore fail. United States Constitution, Art. VI, §2.

ARGUMENT

I.

AECC WAS ORGANIZED AND EXISTS TO ARRANGE FOR AND PROVIDE TO ITS MEMBER CO-OPERATIVES A SUFFICIENT AND RELIABLE SUPPLY OF POWER AND ENERGY. AECC'S AGREEMENTS AND INTERCONNECTIONS WITH MULTI-STATE SYSTEMS OR GRIDS CONSTITUTE A SUBSTANTIAL AND INDISPENSABLE ELEMENT IN THE FULFILLMENT OF THAT PURPOSE.

A. AECC's Structure and organization.

AECC is a cooperative organized under Arkansas' Electric Cooperative Corporation Act, Ark. Stat. Ann. §77-1101, *et. seq.* Each of AECC's seventeen members is a distribution or retail electric cooperative corporation organized under the same act. The member cooperatives obtain all of their power and energy from AECC and sell it, in turn, to their members, the persons, firms, corporations, and associations who reside in each distribution cooperative's service area and are the ultimate consumers of the energy. AECC is wholly owned by the seventeen member cooperatives, each of which designates two persons to serve on the thirty-four member board of directors of AECC (J.S. App., p. 27a).

AECC sells power and energy exclusively at wholesale and makes no sales at retail to ultimate consumers (J.S. App., p. 27a). Most of its sales are to its member cooperatives; the remainder is sold to or exchanged with other utilities or organizations pursuant to contracts and agreements made by AECC in arranging for the power supply commitments needed to provide a reliable and sufficient supply of power and energy for its member cooperatives (J.S. App., p. 27a; J.A. 14-17).

As the wholesale supplier of power and energy for seventeen distribution cooperatives, AECC is obviously able to achieve benefits of economies of scale and superior bargaining power which the members could not realize if operating individually. AECC and each of its member cooperatives are, by statute, non-profit. Ark. Stats. Ann. §77-1103, 77-1125. Typical of electric cooperatives generally, membership is, by statute, open to all persons in rural areas proposed to be served by the cooperative, and each member is entitled to one vote on all matters submitted to membership meetings. Ark. Stats. Ann. §§77-1112, 77-1115. "Person" is defined by statute to include any natural person, firm, association, corporation, business trust, partnership, Federal Agency, State or political subdivision thereof or any body politic. Ark. Stat. Ann. §77-1102 (5).

B. AECC's Operations and Agreements.

AECC achieves its objective of supplying the power and energy needed by its member cooperatives in two primary ways: self-owned generating facilities, and a variety of agreements with other wholesalers of power and energy (J.A. 14-17).

AECC has three wholly owned generating plants (Bailey, McClellan, and Fitzhugh). In addition, it owns fifty percent of the Flint Creek Power Plant; the other fifty percent is owned by SWEPCO, which is part of the Central and South West Corporation, a four-utility holding company operating in Texas, Oklahoma and Arkansas (J.A. 14).

The remainder of the power and energy needed by AECC to serve its members is obtained from other utilities or organizations. The nature and variety of these agreements illustrate the substantial interstate characteristics of AECC's business. These agreements and arrangements include the following:

1. Firm power and energy purchased from AP&L, a wholly owned operating subsidiary of Middle South Utilities (MSU).[2] AP&L's affiliated companies include four utilities operating outside Arkansas. The MSU companies comprise a fully integrated, multi-state system or grid. Therefore, when AECC obtains energy from its interconnections with AP&L, the energy may have been generated at any source in the MSU system.

2. Purchase of firm power and energy from SPA, a government agency which markets power generated at Army Corps of Engineers projects located in various states within its marketing area. When AECC obtains energy from the SPA grid, the energy may have been generated at projects within or outside the state of Arkansas (J.A. 14, 15).

3. Contracts for hydroelectric peaking power from SPA. In contrast to energy associated with firm capacity or power, which can be claimed when needed, energy associated with peaking capacity is available only for limited periods of time (J.A. 15).

4. Purchase of replacement and emergency from SWEPCO when an AECC plant is down and energy is available on the SWEPCO system. This energy may have been generated at any point on the system or grid which includes SWEPCO and its affiliated companies; when the jointly owned Flint Creek plant is down, all energy obtained by AECC from SWEPCO necessarily comes from generating sources out of Arkansas, since Flint Creek is SWEPCO's only Arkansas generating facility (J.A. 14).

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[2]AP&L sells power and energy at wholesale and retail within the state of Arkansas. Its sales at wholesale have been judicially determined to be in interstate commerce. *Arkansas Power & Light Company v. Federal Power Commission*, 368 F.2d 376 (8th Cir. 1966).

5. Purchase of replacement or emergency energy from SPA when AECC's Bailey power plant is down. The replacement energy is furnished from the SPA grid, and may have been generated in or out of Arkansas (J.A. 15).

6. Sales of excess energy to AP&L. The energy is delivered to AP&L and is available for transmission anywhere on the MSU grid; it may be ultimately consumed either inside or outside Arkansas (J.A. 14).

7. Sales of energy to SPA from the generation of AECC's Fitzhugh plant at Ozark, Arkansas, when SPA hydroelectric facilities are low in water and SPA needs energy. This energy goes into the SPA grid and is available for transmission to customers on the SPA system, both in and out of Arkansas (J.A. 14).

8. Sales of power and energy to SPA from AECC's Bailey plant, when needed by SPA. This energy also goes onto the SPA grid for interstate transmission and consumption (J.A. 15).

9. Arrangements for dispatch by other utilities of the energy produced at AECC plants. The McClellan plant at Camden, Arkansas is dispatched by Middle South; the Bailey and Fitzhugh plants are dispatched by SPA, and the Flint Creek plant is dispatched by SWEPCO (J.A. 14, 15). AECC has little transmission capability; it uses the grids of other utilities to transmit most of the energy sold to its members and others. (J.A. 16).

Through this complex set of arrangements, AECC obtains firm power and energy and peaking power and energy, purchases replacement and emergency energy, and engages in the "banking" or exchange of energy. The three organizations with whom these arrangements have been made are all part of multi-state systems or grids. Nearly fifty percent of AECC's costs passed on to member cooperatives arise out of these arrangements (J.A. 30, 31); it is, therefore,

clear that these interstate purchases and sales are a substantial and indispensable part of AECC's provision of the power and energy needed and demanded by its member cooperatives.

When AECC sells energy to a member cooperative (or any other purchaser), the generating source of the energy cannot be determined. The energy available to AECC for transmission and sale is a pool of fungible, inextricably mixed energy which may have been generated in any of several states.

II.

AECC'S SALES TO ITS MEMBER COOPERATIVES ARE SALES AT WHOLESALE IN INTERSTATE COMMERCE.

The first question to be addressed is whether the sales by AECC to its member cooperatives were sales at wholesale in interstate commerce. The PSC conceded that "We presume that some amount of AECC's purchased power originates outside the State and that some of the power it delivers to other suppliers is by them transmitted beyond this State" (J.A. 52). However, the PSC never explicitly recognized or held that the questioned sales were sales at wholesale in interstate commerce.

In *Colton*, one of the issues was whether sales by Edison to the City of Colton, California were sales of electric energy at wholesale in interstate commerce. While the issue arose in the context of an interpretation of the Federal Power Act, the inquiry is precisely the same, and the facts are remarkably similar.

The inquiry is the same because the Court of Appeals had ruled that the Edison sales of energy to the City of Colton were subject to regulation by the state of California, and therefore excepted from FPC jurisdiction by the Federal Power Act.

A brief examination of the facts illustrates the similarities between Edison's sales to Colton and AECC's sales to its members. Edison operated in central and southern California and sold energy only to customers located there. The city of Colton, California purchased its entire energy requirements from Edison. Some of the energy sold by Edison in California originated in Nevada and Arizona. The Federal Power Commission (FPC) found that the sales from Edison to Colton were sales of electric energy at wholesale in interstate commerce, and this Court specifically held that there was substantial evidence to support the FPC's finding. Footnote 5, *Colton*, 376 U.S. at 209. AECC Operates in Arkansas and sells to customers located or having interconnections there. Its member cooperatives obtain their entire power and energy requirements from AECC. Some of the energy sold by AECC to its member cooperatives originates in other states and is transmitted across state lines to AECC and the member cooperatives, and the PSC so held.

Since the PSC and the Arkansas Supreme Court characterized the sales at issue as "local" and therefore not in interstate commerce, another question is whether AECC's sales to its member cooperatives are "in interstate commerce." An issue in *Tri-State Generation & Transmission Association v. Public Service Commission of Wyoming*, 412 F.2d 115 (10th Cir. 1969), was whether Tri-State, a non-profit generation and transmission cooperative, was engaged in interstate commerce. While Tri-State owned no generating facilities and performed no physical functions, it purchased power from the Bureau of Reclamation which was transmitted over Bureau lines to Tri-State's member cooperatives in Wyoming and other states. At the point of delivery from the Bureau to the member cooperative's facilities, title passed from the Bureau to Tri-State and immediately to the member cooperative. The court held:

> We think it clear that the trial court erred in determining that Tri-State was not engaged in interstate commerce. The electrical energy involved in

> these transactions undoubtedly moves across state lines, and to that extent, interstate commerce is involved, but it remains the property of the transmitter until it is delivered to the facilities of the members in Wyoming . . . . Surely Tri-State performs a useful service, so recognized by the REA, which closely supervises the whole REA program. And the services and functions of Tri-State, as those services and functions probe the question of interstate commerce, are indistinguishable from the factual background considered by the Supreme Court in [*Attleboro*] (citation omitted) the rationale of which was restated by the high court in [*Colton*] (citation omitted). The dictates of those cases clearly require a finding that Tri-State is engaged in interstate commerce and we must pass to the question of whether the orders and directives of the Wyoming Commission interfere with that commerce, and, if so, whether the extent of such interference justifies federal injunctive relief.
>
> *Tri-State*, 412 F.2d at 118.

Judge Murrah, joined by Judge Hickey, dissented from the holding that injunctive relief was appropriate. However, the dissenters specifically agreed with the finding that Tri-State was engaged in interstate commerce: "I agree with the majority that Tri-State's operations are in commerce—that power purchased by Tri-State in Nebraska for transmission and sale, wholesale in Wyoming, was in commerce." *Tri-State*, 412 F.2d at 119, 120.

The PSC would justify regulation of the rates charged by AECC to its members by attempting to characterize the transactions as local, rather than interstate or national in character. This court recently rejected a similar argument made in defense of Louisiana's "first-use" tax on natural gas brought into Louisiana from the Outer Continental Shelf:

> Louisiana argues that the taxable "uses" within the State break the flow of commerce and are wholly local events. But although the Louisiana "uses" may possess a sufficient local nexus to support otherwise valid taxation, we do not agree that the flow of gas from the wellhead to the consumer, even though "interrupted" by certain events, is anything but a continual flow of gas in interstate commerce. Gas crossing a state line at any stage of its movement to the ultimate consumer is in interstate commerce during the entire journey.
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> *Maryland v. Louisiana*, 451 U.S. 725 (1981).

The power and energy sold by AECC to its member cooperatives for resale to the ultimate consumers originates both in generating facilities owned by AECC in Arkansas and in facilities of other utilities in and out of Arkansas. The energy is mixed, and, when sold to a member cooperative, cannot be identified as to generating source. It is, therefore, energy sold at wholesale in interstate commerce.

III.

REGULATION BY THE PSC OF AECC SALES AT WHOLESALE TO ITS MEMBER COOPERATIVES IS CONSTITUTIONALLY INVALID, EVEN ASSUMING, ARGUENDO, THAT CONGRESS HAD NOT ACTED IN THIS FIELD.

In a specific line of cases involving attempted state regulation of utility rates, this Court has established clear guidelines for determining when a state may and may not regulate rates charged for electricity or natural gas moving in interstate commerce. In *Public Utilities Commission v. Landon*, 249 U.S. 236 (1919), it was held

> That the transportation of gas through pipelines from one state to another is interstate commerce may not be doubted. Also, it is clear that as part of such commerce the receivers might sell and deliver gas so

> transported to local distributing companies free from unreasonable interference by the state (citations omitted).
>
> But in no proper sense can it be said, under the facts here disclosed, that sale and delivery of gas to their customers at burner-tips by the local companies operating under special franchises constituted any part of interstate commerce.
>
> *Id.* at 245.

Pennsylvania Gas Company v. Public Service Commission, 252 U.S. 23, (1920), held that, while a state may not regulate the transmission and sale of natural gas produced in one state and transported by means of pipelines to another state, it may regulate sales by the same company to local consumers.

Approached from another direction, it was held in *Missouri v. Kansas Natural Gas Company*, 265 U.S. 298, (1924), that the transportation of gas from one state to another is in interstate commerce, and the sale and delivery of it to local distributing companies is a part of such commerce. The court said:

> But the commerce clause of the Constitution, of its own force, restrains the States from imposing direct burdens upon interstate commerce. In *Minnesota Rate Cases*, 230 U.S. 352, 396, Mr. Justice Hughes, speaking for the Court, said: "If a state enactment imposes a *direct burden* upon interstate commerce, it must fall regardless of Federal legislation. The point of such an objection is not that Congress has acted, but that the State has directly restrained that which in the absence of Federal regulation should be free."
>
> . . . But Congress thus far has not seen fit to regulate it, and its silence, where it has the sole power to speak, is equivalent to a declaration that that particular commerce shall be free from regulation.
>
> *Id.* at 307, 308.

Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Company, 273 U.S. 83 (1927), held that the decision was contolled by the holding of *Missouri v. Kansas Gas Company*, 265 U.S. 298 (1924)[3] and that Rhode Island could not, without offending the Commerce Clause, regulate the rate at which a Rhode Island generating company sold energy to a Massachusetts distribution Company.

This Court has had occasion to consider and restate the holding in *Attleboro* in subsequent cases. In *United States v. Public Utilities Commission of California*, 345 U.S. 295 (1953), the following observation was made:

> Part II [of the Federal Power Act] is a direct result of *Attleboro*. They are to be read together. The latter left no power in the states to regulate licensees' sales for resale in interstate commerce, while the former established federal jurisdiction over such sales.
>
> *Id.* at 311.

In the *Colton* case, the test established by the *Attleboro* line of cases was important because the court found that Congress, in enacting the Federal Power Act and the Natural Gas Act, had adopted the same test. The Ninth Circuit had held that the proviso in §201 (a) of the Federal Power Act, Part II, §201 , ch. 687, 49 Stat. 847 (1935) (Codified as 16 U.S.C. §824 (1978 & Supp. 1982)) confined jurisdiction to those interstate sales at wholesale constitutionally beyond the

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[3] "[B]ut that in the sale of gas in wholesale quantities, not to consumers, but to distributing companies for resale to consumers, where the transportation, sale and delivery constitutes an unbroken chain, fundamentally interstate from beginning to end, "the paramount interest is not local but national, admitting of and requiring uniformity of regulation," which, "even though it be the uniformity of governmental non-action, may be highly necessary to preserve equality of opportunity and treatment among the various communities and States concerned." *Attleboro*, 273 U.S. at 89.

power of state regulation. §201 (a) provided that "Federal Regulation of . . . the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States." Federal Power Act, §201, quoted in *Colton*, 376 U.S. at 208, n.2 (1964).

The Ninth Circuit reasoned that the FPC could not assert jurisdiction because the sales in question could be constitutionally regulated by California without offending the Commerce Clause; it reached that conclusion through an analysis of the impact of state regulation of the sale upon the national interest in commerce. This Court reversed the Ninth Circuit.

The key statement of the *Colton* case, as it relates to the instant issues, is found in the Court's characterization of the test adopted by Congress in the Federal Power Act: "What Congress did was to adopt the test developed in the *Attleboro* line which denied state power to regulate a sale 'at wholesale to local distributing companies' and allowed state regulation of a sale at 'local retail rates to ultimate consumers.' " (citations omitted) *Colton*, 376 U.S. at 214. And, finally, it was noted that: "Plainly, the Court of Appeals' reading of the §201 (a) proviso as requiring an appraisal in each case of the impact of the particular sale, is inconsistent with these decisions." *Id.* at 215.

In short, this court held that the sales in *Colton* were beyond the power of the State of California to regulate (and therefore within the power of the FPC to regulate).

The factual similarities between Edison's sales in the *Colton* case and AECC's sales in this case are obvious. Edison operated in central and southern California and sold energy only to customers located there. AECC is located in Arkansas and for the most part sells energy only to customers located or taking delivery in Arkansas.

The City of Colton used some of the power purchased from Edison for municipal purposes, but resold the bulk of it to residential, commercial, and industrial customers in its area. AECC's member cooperatives resell the energy purchased from AECC to their members, the residential, commercial and industrial customers who are the ultimate consumers of the power.

The error committed by the PSC and the Supreme Court of Arkansas is the same error committed by the Ninth Circuit in *Colton*. Instead of applying the test of the *Attleboro* line of cases, which was to draw the obvious and easily determined line between sales at retail to ultimate consumers and sales at wholesale of power and energy moving in interstate commerce, both purported to analyze the impact of state regulation on interstate commerce, and characterized AECC's sales at wholesale as "local" and therefore subject to state regulation.

The lesson of the *Attleboro* line of cases, as interpreted and expanded in later cases, is clear. As this Court said in *Colton*, the test of the *Attleboro* line of cases is that it

> [D]enied state power to regulate a sale "at wholesale to local distributing companies" and allowed state regulation of a sale at "local retail rates to ultimate consumers."
>
> *Colton*, 376 U.S. at 214.

When we apply this lesson it becomes clear that the state of Arkansas cannot constitutionally regulate the rates charged by AECC to its member cooperatives for power and energy, since those sales are sales at wholesale of energy, a substantial part of which has moved in interstate commerce.

IV.

THE RURAL ELECTRIFICATION ACT ALONG WITH THE SUPERVISION AND CONTROL EXERCISED

BY THE ADMINISTRATOR OF REA OCCUPIES THE FIELD, AND STATE REGULATION OF AECC'S WHOLESALE RATES IS INCONSISTENT AND MAY CONFLICT WITH THE EXERCISE OF THAT SUPERVISION AND CONTROL; REGULATION OF THE RATES IN QUESTION BY THE ARKANSAS PUBLIC SERVICE COMMISSION IS THEREFORE PRE-EMPTED BY FEDERAL LAW.

In considering whether Congress has pre-empted state regulation of a particular area, this Court has often stated that avoiding conflicting regulation is the basis of pre-emption analysis.

> The constitutional principles of pre-emption, in whatever particular field of law they operate, are designed with a common end in view: to avoid conflicting regulation of conduct by various official bodies which might have some authority over the subject matter.
>
> •

Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v. Lockridge, 403 U.S. 274 at 285, 286 (1971).

More recently, the Court has restated long-standing principles in this area. ". . . In this as in other fields, the question of whether federal law pre-empts state law 'involves a consideration of whether that law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' (citations omitted). If it does not, state law governs." *Aronson v. Quick Point Pencil Company*, 440 U.S. 257 at 262 (1979).

As a borrower of funds, AECC is subject to extensive supervision and regulation by REA. The same is, of course, true as to virtually all electric cooperatives engaged in generation and transmission of power and energy.

The authority given to the Administrator of REA is quite broad and contains few limitations. The Administrator's primary authority is to make loans for the purposes of rural electrification. §4 of the act provides:

> [The] Administrator, in making such loans, shall give preference to States, Territories, and subdivisions and agencies thereof, municipalities, peoples' utility districts, and cooperative, nonprofit, or limited-dividend associations, the projects of which comply with requirements of this chapter. Such loans shall be on such terms and conditions relating to the expenditure of the moneys loaned and the security therefor as the Administrator shall determine . . . . *And provided further,* That no loan for the construction, operation, or enlargement of any generating plant shall be made unless the consent of the State authority having jurisdiction in the premises is first obtained . . .

The Administrator's expansive use of the authority granted has been noted in other proceedings. The FPC, in its decision in *Re Dairyland Power Cooperative*, 67 PUR 3rd 340 (January 5, 1967), made the following observations:

> As former Chairman Swidler phrased it, the REA 'settled upon co-operatives as its primary instrument for bringing the blessings of electric power supply to the farmers of this country.'
>
> Under the Rural Electrification Act, the administrator has virtually absolute discretion and exercises extensive and rigid supervision and control over its co-operative borrowers. The co-operative's books and records must be kept in accordance with the REA Uniform System of Accounts. Appointments of its manager, counsel, and other key personnel are subject to approval by REA. It cannot merge or consolidate, or sell or encumber any of its property without REA approval. The government's mortgage

> lien attaches to each of its extensions, and it cannot build extensions except with additional REA financing, or with REA approval of other financing. Thus, it cannot grow without REA approval. All of its contracts, including those for the purchase and sale of electric energy, must be approved by REA, and by this means REA controls the rates the cooperative pays and the rates it charges. Moreover, the need to return to REA for additional loans as the cooperative grows provides another mechanism whereby REA exercises control.
>
> The thousands of pages of directives and instructions testify to the intimate relationship between the cooperatives and REA, a federal agency, and the extensive controls and guidance which it exercises.
>
> *Id.* at 346.

The power and authority exercised by the administrator was also discussed in *Salt River Project Agricultural Improvement and Power District v. Federal Power Commission*, 391 F.2d 470 (D.C. Cir. 1968). There the court said:

> Through its lending authority REA exercises extensive supervision over the planning, construction and operation of the facilities it finances. The REA borrower as a condition of securing its loan must secure REA approval of its manager, engineeer and counsel; of its construction contracts and contracts for purchase of materials, equipment and supplies; of its contracts for purchase and sale of power; of its insurance coverage, its purchase of land, and so on (citation omitted). Moreover, REA's concern is not only with providing high standards of electric service and guaranteeing its loan, but also with reducing the cost of service to the cooperative's consumers. It furnishes retail rate schedules designed for rural use and assists

> distribution cooperatives in obtaining electric energy at reasonable costs.
>
> Though REA regulation and supervision of cooperatives are, in many respects, far more comprehensive than those which the Federal Power Commission exercises over investor-owned utilities, there are certain areas, such as rate-making, where the cooperatives enjoy a freer hand. But it is in these areas that, by their structural nature, the cooperatives are effectively self-regulating. They are completely owned and controlled by their consumer-members, and only consumers can become members. They are non-profit (citation omitted). Each member has a single vote in the affairs of the cooperative, and service is essentially limited to members. No officer receives a salary for his services and officers and directors are prohibited from engaging in any transactions with the cooperative from which they can earn any profit.
>
> *Id.* at 473.

There are distinct and obvious differences in the nature, purpose and effect of regulatory or supervisory statutes such as the Rural Electrification Act, and regulatory acts such as the Federal Power Act or the Arkansas statutes which regulate utilities generally.

The latter were directed primarily toward regulation of investor-owned utilities because of the abuses which quickly appeared when there was no regulation, and were intended to protect the public from the dangers of uncontrolled monopolies owned by absentee shareholders, including large institutional investors.

The Rural Electrification Act, by great contrast, was passed not primarily to protect the public, but to extend to the rural public the great benefits of electrification, including labor-saving devices, access to public information by radio, plumbing and refrigeration that greatly promoted health and

welfare, and electrical lighting which promoted safety and much greater household convenience.

Since cooperatives are the primary instruments by which REA has furthered the accomplishment of these worthy objectives for nearly fifty years, it has not been necessary for the Administrator to exercise great control in matters such as rate-making, because the cooperatives are effectively controlled by the consumers they serve; their membership is open to all whom they might serve; their procedures are democratic; and they are, by statute, non-profit. Nonetheless, Congress has acted, and when it did, it granted plenary authority to the Administrator to control and regulate those borrowing from REA, and those borrowers have been almost exclusively cooperatives.

The aims of the REA remain the same today. The control exercised by the Administrator has resulted in an excellent record of payment of loans. By assiduously protecting REA's security in the loans made to cooperatives, defaults have been avoided and funds have been repaid to REA which could be used for additional loans.

If the PSC should determine that rates charged by AECC to member coooperatives and previously approved by REA are, for whatever reason, higher than in the commission's opinion they should be, then the rates, which had been approved by REA, would have to be lowered. It is not hard to imagine a situation where the Administrator would determine that the rates set by the PSC were not sufficient to protect the REA's security in loans made to AECC. At a minimum, a PSC-mandated reduction in the revenue that AECC realized from sales to its member cooperatives would result in a corresponding increase in the rates which AECC charges for the power it sells to or exchanges with AP&L, SPA, or SWEPCO. The effect on these interstate arrangements and transactions is obvious; it would result in higher rates paid by consumers in other states for the energy when it is sold by those who purchase from AECC.

CONCLUSION

A substantial portion of the power and energy sold by AECC to its member cooperatives is generated outside Arkansas and moves in interstate commerce. Even if Congress had been silent, the PSC would be prohibited by the Commerce Clause from regulating those wholesale rates, as held in *Attleboro*, its precursors and progeny; but Congress has acted in the Rural Electrification Act, granting plenary authority to the Administrator to loan money for rural electrification on "such terms and conditions relating to the expenditures of the moneys loaned and the security therefor as the Administrator shall determine;" and the Administrator has exercised that authority through close supervision and control of its cooperative borrowers. The Arkansas Public Service Commission's goal of regulating rates to balance the never-ending tug-of-war between stockholder and consumer may well conflict with REA's goal of bringing the great benefits of electrification to the rural areas of this nation and protecting its security for money loaned to accomplish these purposes. The Congressional action pre-empted the exercise of any such jurisdiction by Arkansas or any other state, and must prevail. For both reasons, regulation by the Arkansas Public Service Commission is not constitutionally permissible, and the decision below should be reversed.

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In the

Supreme Court of the United States

No. 81-731

October Term, 1982

Arkansas Electric Cooperative Corporation, *Appellant*

V.

Arkansas Public Service Commission, *Appellee*

APPEAL FROM THE
SUPREME COURT OF ARKANSAS

BRIEF FOR APPELLEE

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V.

Arkansas Public Service Commission, *Appellee*

APPEAL FROM THE
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BRIEF FOR APPELLEE

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

All the constitutional provisions and statutes cited by the Appellee have previously been set forth in Appellant's Jurisdictional Statement, in Appellee's Motion to Dismiss, or in the Joint Appendix, with the exception of Ark. Stat. Ann. §73-202.3 (Repl. 1973), which provides:

> 73-202.3. *Commission regulations shall not conflict with United States government regulations.*—The Commission shall make no regulations affecting electric cooperative corporations in matters of accounting, record keeping, or fiscal management, in conflict with regulations which have been, or shall be, promulgated by the Administrator of the said Rural Electrification Administration, or other such agency or instrumentality described above in Section 2.

SUMMARY OF ARGUMENT

Arkansas Electric Cooperative Corporation (hereinafter AECC) seeks to have declared unconstitutional, under the Commerce Clause, an Arkansas Public Service Commission order which does not discriminate against interstate commerce, which imposes no tax on such commerce, which prohibits no particular activity and which excludes no product or business from Arkansas. No allegation is made that the order protects either local markets or local consumers at the expense of out-of-state interests. The impact of the order falls entirely on an Arkansas corporation. In short, this order is afflicted by none of the infirmities which have in recent years led this Court to find other state initiatives in violation of the Commerce Clause. This order, Order No. 2 in Commission Docket No. U-2992, simply asserts, pursuant to Ark. Stat. Ann. §73-201, *et seq.*, (Repl. 1979), the Commission's power over the rates charged by AECC to local distribution cooperatives.

While courts have generally recognized state power over utility rates, AECC argues it should be exempt from such regulation. AECC relies primarily on *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Company*, 273 U.S. 83, 47 S.Ct. 294, 71 L.Ed. 549 (1927), prohibiting state regulation of out-of-state wholesale power sales, and *Federal Power Commission v. Southern California Edison Company* (the *Colton* case), 376 U.S. 205, 84 S.Ct. 644, 11 L.Ed. 638 (1964), defining the jurisdiction of the Federal Power Commission under the Federal Power Act. These cases, however, are not on point. More helpful, more recent and today more frequently cited, we submit, is *Pike v. Bruce Church*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). There the Court said, in effect, that reasonable, non-discriminatory state regulations only incidentally affecting interstate commerce will be upheld unless the burden on such commerce "is clearly excessive in relation to the putative local benefits." *Id.* at 142. Under such a test, the Commission should prevail.

The Solicitor General, in an *amicus curiae* brief, suggested that the Federal Power Act and the Rural Electrification Act evince "congressional guidance" that AECC go unregulated. The National Rural Electric Cooperative Association takes a similar position. This argument, we believe, is outside the question presented to this Court for review, whether the Commerce Clause standing alone precludes state regulation. Nonetheless, these references to irrelevant legislative history do not support AECC's position. The Federal Power Act, provoked by judicial restraints on state power, and the Rural Electrification Act, intended to bring electricity to the American countryside, were never meant to supplant state jurisdiction over utility rates.

ARGUMENT

REGULATION BY THE STATE OF ARKANSAS OF THE RATES AT WHICH AECC SELLS ELECTRICITY TO LOCAL DISTRIBUTION COOPERATIVES DOES NOT VIOLATE THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

I. Introduction

In this case, the Supreme Court is asked to decide whether the Commerce Clause of the United States Constitution prohibits a state from regulating the rates at which a generating cooperative sells power to local distribution cooperatives. [1]

Specifically, the State of Arkansas seeks to regulate the rates of AECC, a corporation organized by seventeen Arkansas distribution cooperatives to provide them with electricity. Some of this power is generated by AECC. Additional energy is purchased from Arkansas Power & Light Company, Southwestern Electric Power Company and the Southwestern Power Administration (J.A. 14-15). The State makes no claim of jurisdiction over transactions between AECC and its suppliers or over AECC's sales to anyone other than the local cooperatives.

The decisions of this Court have clearly established that the purpose of the Commerce Clause is to "create an area of free trade among the several states." *See, Great Atlantic & Pacific Tea Company, Inc. v. Cottrell*, 424 U.S. 366, 370, 96 S.Ct. 923, 47 L.Ed.2d 55 (1976). To achieve this end, the Commerce

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[1] The Commerce Clause provides that:

> The Congress shall have power . . . To regulate commerce with foreign nations and among the several states. United States Constitution, Article I, §8, cl. 3.

Clause has been interpreted as not only granting Congress the power to regulate commerce in the national interest, but, standing alone, as prohibiting certain forms of state regulation. *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 98 S.Ct. 787, 54 L.Ed.2d 664 (1978). This does not mean the states are powerless to regulate commercial activity. Until Congress occupies the field with conflicting legislation, a state may, in exercising its police power, enact reasonable regulations of its local affairs even though interstate commerce may be affected. *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 100 S.Ct. 2009, 64 L.Ed.2d 702 (1980).

In the past, this Court often attempted to determine the limits of state power by distinguishing between commercial and police regulations or between direct and indirect burdens on interstate commerce.[2] Such formulistic approaches have largely been abandoned by the Court in more recent cases. Contemporary decisions favor a straightforward analysis of the purposes the Commerce Clause was intended to achieve and of the relative merits of competing local and national interests. *See, Pike v. Bruce Church*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). Yet, it is on a mechanical distinction between wholesale and retail sales that AECC opposes state regulation. The State of Arkansas suggests that the Commerce Clause draws no such arbitrary line. Until AECC can show a significant distinction between wholesale and retail sales, and some danger to the national interest by state regulation of the former, the result below should be affirmed.

II. State Regulation of AECC's Rates Is Permissible Under the Test Used in *Pike v. Bruce Church*.

In *Pike v. Bruce Church*, *supra*, striking down an Arizona statute governing the packaging of cantaloupes, this Court

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[2] *See, Mayor of the City of New York v. Miln*, 36 U.S. (11 Pet.) 102, 9 L.Ed. 648 (1837). *See also, Smith v. Alabama*, 124 U.S. 465, 31 L.Ed. 508 (1888). This kind of analysis has been criticized by a leading commentator. *Tribe, American Constitutional Law*, pp. 323-327 (1978).

articulated a standard which has since been generally used to test the validity of state economic regulations.[3] Where a legitimate local interest exists, nondiscriminatory regulation only incidentally affecting interstate commerce will be upheld unless the burden on such commerce "is clearly excessive in relation to the putative local benefits." The degree of any burden that can be tolerated depends on the nature of the local interest and whether less drastic measures could promote it. *Id.* at 178.

The first criteria under this test, the existence of a legitimate local interest, is easily met. Indeed, few subjects could be of greater local concern than utility rates. The State of Arkansas has an obvious interest in adopting pricing policies that encourage energy conservation and the wise use of its natural resources. The State has an interest in preventing unfair discrimination among customers. The State has an interest in preventing utility rates from oppressing its citizens, while insuring rates are sufficient to maintain reliable electric service. No federal agency could have a greater interest in rural electrification than does the State of Arkansas.

The State's interest in the proper design of AECC's rates, as opposed to simply the level of those rates, should not be underestimated. As one leading commentator has observed:

> Despite its recognized importance as a basis of rate control, the determination of revenue requirements

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[3]Cases citing *Pike v. Bruce Church* with approval include *Kassel, et al. v. Consolidated Freightways Corporation of Delaware*, 450 U.S. 662, 101 S.Ct. 1309, 67 L.Ed.2d 580 (1981); *Minnesota v. Clover Leaf Creamery Company, et al.*, 449 U.S. 456, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981); *Lewis v. BT Investment Managers, Inc., supra; Raymond Motor Transportation, Inc. v. Rice, supra; Philadelphia v. New Jersey*, 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978); *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977); *Great Atlantic & Pacific Tea Company v. Cottrell, supra; Hughes v. Alexandria Scrap Corporation*, 216 U.S. 794, 96 S.Ct. 2488, 49 L.Ed.2d 220 (1976).

> under a fair-return standard, . . . by no means exhausts the issues of a rate case. For even if this standard were accepted as the master rule of rate making, overriding all conflicting rules such as that against unjust discrimination—an exalted status which, though sometimes claimed for it, it does not enjoy in fact—there would still remain the question what specific rates will yield a fair return. . . . *Bonbright, Principles of Public Utility Rates*, p. 287 (1961).

Proper rate design requires the development, first, of rates which produce the appropriate amount of revenue, and second, the creation of rates which do not discriminate unfairly among different classes of customers. Indeed, the avoidance of unfair discrimination is "one of the most nearly universal obligations" imposed on public utilities. *Bonbright, supra*, p. 367. The importance of this issue to the State of Arkansas is not mitigated by AECC's status as a cooperative. Electric rates include not only a charge for the total amount of energy actually used by a customer, but also a charge for his maximum demand on the system at some point in time. Unless all the distribution cooperatives have identical load factors, their demand on the system over time, a rate design incorporating a demand charge fair to one cooperative could be unfair to another. The alleged self-regulating status of AECC would not necessarily prevent this. In fact, Mr. Fish, AECC's General Manager, admitted to the Commission that AECC charged all the cooperatives the same rate regardless of their load factors. (J.A. 21). The potential inequity of charging customers one rate, even though different patterns of cost causation may exist, is of serious concern to the State of Arkansas.

The validity of the State interest at issue here is reflected in the common law's traditional acceptance of governmental regulation of business "affected with a public interest". Lord Chief Justice Hale in his seventeenth century treatises *De Portibus Maris* and *De Jure Maris* acknowledged at that early date that the owner of property publicly used, such as a ferry

boat or wharf, could take only a "reasonable toll" for its use. Chief Justice Taney in *The License Cases*, 46 U.S. (5 How.) 504, 12 L.Ed. 256 (1847), wrote that inherent in the concept of sovereignty was the police power, which, Taney said, had historically, in both England and the United States, included the authority to:

> ... regulate ferries, common carriers, hackman, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. *Id.* at 583.

In *Munn v. Illinois*, 94 U.S. 113, 24 L.Ed. 77 (1877), upholding state regulation of the rates of grain elevators, this Court relied upon the writings of Lord Chief Justice Hale and Chief Justice Taney. Later decisions continued to recognize state power to regulate not only public utility rates, but the prices of other businesses and commodities "affected with a public interest" as well. *See, Nebbia v. New York*, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934) (milk prices); *German Alliance Insurance Company v. Lewis*, 233 U.S. 389, 34 S.Ct. 612, 48 L.Ed. 1011 (1914) (insurance rates); *Smyth v. Ames*, 169 U.S. 466, 18 S.Ct. 418, 42 L.Ed. 819 (1898) (intrastate railroad rates). In short, the decisions of this Court have recognized a legitimate state interest in the rates charged the citizens of a state for essential goods and services.

Next, one must ask whether the state regulation at issue falls more heavily on out-of-state concerns than it does on local businesses and whether it impedes the natural laws of supply and demand. State action aimed simply at protecting local economic interests at the expense of outsiders will not survive judicial review. *See, Dean Milk Company v. Madison*, 340 U.S. 349, 71 S.Ct. 295, 95 L.Ed. 329 (1951). *See also, H. P. Hood & Son, Inc. v. Dumond*, 336 U.S. 525, 69 S.Ct. 657, 93 L.Ed.2d 865 (1949). Regulation of AECC's rates clears this hurdle easily. The order at issue falls entirely on an Arkansas corporation. The record contains no evidence tending to show how regulation

might restrict the movement of power through Arkansas. No allegation is made that the State was motivated by any desire to protect local industry or local consumers at the expense of their out-of-state counterparts.

Pike v. Bruce Church, supra, and subsequent decisions, further permit state regulation to have only an incidental effect on interstate commerce. The transactions the State here attempts to regulate are all between Arkansas corporations doing business primarily in Arkansas. Out-of-state interests will be affected, if at all, only because AECC buys and sells some power in the interstate market. AECC is not, however, itself a regional distributor; the Commission found as fact that its reason for existence was simply to provide power to member cooperatives (J.A. 53-54).

Comparison to *Panhandle Eastern Pipeline Company v. Michigan Public Service Commission*, 341 U.S. 329, 71 S.Ct. 777, 95 L.Ed. 993 (1951) may be helpful. There the Court upheld a Michigan law requiring interstate gas pipeline companies to obtain a certificate of convenience and necessity from the Michigan Public Service Commission before selling gas to industrial customers. The Court rejected the argument that the interstate nature of the regulated companies immunized them from State regulation on the ground that "the proposed sales are primarily of local interest." *Id.* at 332. [4]

Rate regulation of intrastate sales may likewise have only an incidental effect on the flow of interstate commerce. An analogy might be drawn between AECC and the railroads. While the states may not set rates for the interstate

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[4] A similar result was reached in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), upholding a state price support system for the California raisin industry. Even though California produced much of the nation's raisin crop, the Court found the State's price support plan to be "a regulation of state industry of local concern." *Id.* at 368. *See also, Buck v. California*, 343 U.S. 99, 72 S.Ct. 502, 96 L.Ed. 775 (1952) (upholding state regulation of taxi cabs).

transportation of passengers or goods, the movement of either between two points in a single state is subject to the ratemaking authority of the state. *The Minnesota Rate Cases*, 230 U.S. 352, 33 S.Ct. 729, 57 L.Ed. 1511 (1913). Under this reasoning, a sale by AECC to a Mississippi cooperative would be constitutionally immune from Arkansas' jurisdiction, but the sales at issue here would not be. Other decisions upholding as essentially local rate regulation of businesses with some interstate contacts include *Milk Control Board v. Eisenberg Farm Products*, 306 U.S. 346, 59 S.Ct. 528, 83 L.Ed. 752 (1939) (milk prices) and *Port Richmond & Bergen Point Ferry Company v. Board of Chosen Freeholders*, 234 U.S. 317, 34 S.Ct. 821, 58 L.Ed. 1330 (1914) (ferry boat rates).

Finally, application of the *Pike v. Bruce Church* test requires a weighing of the burden imposed on interstate commerce against "the putative local benefits." Reasonable intrastate rates should not, however, be held a burden on interstate commerce. *The Minnesota Rate Cases, supra.* The Commission is constitutionally precluded from fixing unreasonable rates for AECC, *Federal Power Commission v. Hope Natural Gas Company*, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333 (1944), and legally precluded from issuing orders inconsistent with Rural Electrification Administration regulations. Ark. Stat. Ann. §73-202.3 (Repl. 1979). Ratemaking within these limits, unlike confiscatory rates, prohibitory regulations, or unfair taxes, is, if anything, only a minimal burden on interstate commerce.

We believe the balance has already been struck in favor of the state by *Cities Service Gas Company v. Peerless Oil & Gas Company*, 340 U.S. 179, 71 S.Ct. 215, 95 L.Ed. 190 (1950). There an order of the Oklahoma Corporation Commission fixing a minimum wellhead price for natural gas was upheld, even though ninety percent of the gas eventually left Oklahoma. In language similar to that found in more recent cases, Justice Clark wrote for the majority:

> It is now well settled that a state may regulate matters of local concern over which federal authority has not been exercised, even though the regulation has some impact on interstate commerce. [Citations omitted.] The only requirements consistently recognized have been that the regulation not discriminate against or place an embargo on interstate commerce, that it safeguard an obvious state interest, and *that the local interest at stake outweigh whatever national interest there might be in the prevention of state restrictions. Id.* at 186-87 [Emphasis added.]

The Oklahoma Commission defended its action as a necessary conservation measure. Although recognizing a national concern with natural gas supplies, the Court concluded "it is far from clear that on balance such interest is harmed by the state regulations under attack here." *Id.* at 187. The case at bar comes easily within the holding of *Cities Service Gas Company v. Peerless Gas & Oil, supra,* in part because AECC is selling electricity for local consumption, not national distribution, and in part because Arkansas has other interests at stake, affordable rates and reliable service, than just conservation. [5]

No less drastic means is likely to achieve the ends of the State of Arkansas. AECC has suggested the Commission indirectly control its rates by simply disallowing certain purchased power costs from the distribution cooperatives' operating expenses when their rates are made (J.A. 9, 42). We suggest such a procedure would prove unworkable. More importantly, however, we doubt it would be a less drastic measure. We submit interstate commerce could flow more easily if the Commission simply set reasonable rates for AECC than if the cooperatives were expected to buy power from

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[5] As a minimum price, the rates in *Cities Service Gas Company v. Peerless Gas & Oil Co., supra,* could have been criticized as an attempt to extract excessive revenues from out-of-state companies. No such criticism could be made in the present case.

AECC not knowing whether such expenses would be allowed for ratemaking purposes. The Commission prefers to do directly what AECC proposes be done indirectly.

III. State Regulation of AECC's Rates Is Not Precluded by the *Colton* Case or by *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Company.*

AECC's argument against state regulation is based almost entirely on this Court's decisions in *Federal Power Commission v. Southern California Edison Company,* (the *Colton* case), 376 U.S. 205, 84 S.Ct. 644, 11 L.Ed.2d 638 (1964) and *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Company,* 273 U.S. 83, 47 S.Ct. 294, 71 L.Ed. 549 (1927).

In *Attleboro, supra,* this Court simply held that the State of Rhode Island could not regulate the rates at which the Narragansett Electric Lighting Company, a Rhode Island corporation, sold electricity to the Attleboro Steam & Electric Company, a Massachusetts corporation. In reaching this result, *Attleboro* discussed *Pennsylvania Gas Company v. Public Service Commission,* 252 U.S. 23, 40 S.Ct. 279, 64 L.Ed. 434 (1920), upholding state regulation of retail gas rates, and *Missouri ex rel Barnett v. Kansas Natural Gas Company,* 265 U.S. 298, 44 S.Ct. 544, 68 L.Ed. 1027 (1924), striking down state regulation of gas sales to distributing companies. The Court found the latter case controlling, a result which has led AECC to challenge the Commission's jurisdiction.

AECC's position would be correct if the Court in *Attleboro, supra,* and *Kansas Natural Gas Company, supra,* had merely held that no wholesale power sale could be regulated by the states. Even at such an early date, however, the Court was not drawing such arbitrary distinctions. The test was not whether the rates were wholesale or retail, but whether "the particular business which is regulated is essentially local or national in character." *Id.* at 90.

Kansas Natural Gas Company was a Delaware corporation which bought in Oklahoma gas which it piped to Kansas and Missouri for resale. The Court found its business to be "fundamentally interstate." Narragansett Electric Lighting Company was a Rhode Island utility trying to sell electricity in another state. State regulation was denied in *Attleboro* because Rhode Island might have sought to subsidize local rates by allowing Narragansett to charge excessive rates to its Massachusetts customers and since Massachusetts might have retaliated, leading precisely to the kind of economic warfare the Commerce Clause was intended to prevent. This policy consideration, really the only one mentioned by the Court, was a result of the interstate nature of the sales, not because they were wholesale transactions. The fears the *Attleboro* Court expressed are unfounded where a local company is seeking to sell to another local company. AECC's business is essentially local and its status as a wholesaler is irrelevant.

AECC also argues that state jurisdiction is barred by this Court's decision in *Federal Power Commission v. Southern California Company*, (the *Colton* case), 376 U.S. 205, 84 S.Ct. 644, 11 L.Ed.2d 638 (1964), a case involving sales by an investor-owned utility to the City of Colton, California, which operated its own distribution system. There the Court held that the Federal Power Commission (hereinafter, FPC), not the State of California, had jurisdiction. The *Colton* case, however, involved only the application of the Federal Power Act (hereinafter, FPA). The Court reached its decision without holding the State of California was prevented by the Commerce Clause from regulating the transaction itself.

Section 201(a) of the FPA gave the FPC (now the Federal Energy Regulatory Commission) jurisdiction over sales not subject to state jurisdiction. Section 201(b) gave the FPC jurisdiction over wholesale sales in interstate commerce. The Ninth Circuit, which had upheld state jurisdiction, and the Supreme Court, which reversed the lower

court, agreed the transactions were wholesale sales in interstate commerce. The Ninth Circuit held that because of the predominant local interest, state jurisdiction should be upheld under §201(a).

The Supreme Court reversed, but it should be emphasized, not because it held the States lacked jurisdiction as a matter of constitutional law, but because it held §201(b) controlled over §201(a). The Court observed Congress interpreted *Attleboro* as a far reaching prohibition on state power. To correct what Congress saw as an undesirable situation, it passed the FPA, extending FPC jurisdiction over federal "licensees." *Id.* at 215. To avoid entangling the FPC in the jurisdictional conflicts which had frustrated the states, Congress, in passing the FPC, "meant to draw a bright line easily ascertained, between state and federal jurisdiction." The Court, in the *Colton* case, was therefore, only trying to give effect to the intent of Congress in passing the FPA, and was not trying to impose any constitutional limitations on State power. In fact, the Court casts some doubt on the Congressional reading of *Attleboro* when it observed that although Congress had acted on the premise that *Attleboro* had made federal intervention necessary if "major aspects of interstate transmission and sale" were to be regulated, there existed "another line of cases which adopted a more flexible approach to state power under the Commerce Clause." *Id.* at 214. The *Colton* case does not support AECC's position. On the contrary, Congress' failure to place rural cooperatives under FPC jurisdiction, suggests, if anything, that Congress may have believed the states could regulate them.

IV.

State Regulation of AECC's Rates Has Not Been Preempted by the Rural Electrification Act or by the Federal Power Act.

The Solicitor General and the National Rural Electric Cooperative Association have advanced the argument in their Briefs that Congress, through passage of the Federal Power Act and the Rural Electrification Act (hereinafter, REA), has preempted state jurisdiction over AECC. AECC argues in its Brief that the REA has preempted the State. We disagree. [6]

This Court has historically shown a considerable reluctance to find that congressional action has superseded the exercise of the state's police power. *Schwarz v. Texas*, 344 U.S. 199, 73 S.Ct. 232, 97 L.Ed. 231 (1952). In fact, it has often been held that only where an actual conflict between the federal and state laws exists, will the state be held preempted. For example, in *Townsend v. Yeomans*, 301 U.S. 441, 57 S.Ct. 842, 81 L.Ed. 1210 (1937), the State of Georgia attempted to regulate the rates of tobacco warehouses, even though Congress had recently passed the Federal Tobacco Act, setting standards for the sale of tobacco. In upholding the Georgia law, the Court said:

> This case calls for the well-established principle that Congress may circumscribe its regulation and occupy a limited field, and that the intent to supersede the exercise by the state of its police powers as to matters not covered by the federal legislation is not to be implied unless the latter fairly interpreted is in actual conflict with the state law. *Id.* at 454.

This Court has more recently held that state regulation may be preempted not only by an express Congressional declaration to that effect or by an actual conflict with federal law, but also by a need for a uniform national policy.

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[6] AECC, in its Jurisdictional Statement, simply asked this Court to decide whether the Commerce Clause precluded state regulation. To raise now the preemption issue, a question of statutory construction, not constitutional law, the Commission suggests, is inappropriate. Nevertheless, since the Court may disagree, the Commission has elected to discuss the preemption issue on its merits.

See generally, *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963). The presumption that must be overcome, however, remains the same; Congress did not intend to displace state law. *Maryland v. Louisiana*, 451 U.S. 725, 101 S.Ct. 2114, 68 L.Ed. 576 (1981).

The FPA contains no express prohibition of state regulation of electric cooperatives. In fact, §824(a) of the Act, declaring to be in the public interest federal regulation of "the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce," provides that "such federal regulation" extends "only to those matters which are not subject to regulation by the States." This is hardly the language of preemption.

No actual conflict between the purposes of the FPA and Ark. Stat. Ann. §73-202a exists since, as §824(a) suggests, the purpose of the FPA was to supplement, not supplant state jurisdiction. *New England Power Company v. New Hampshire*, ___ U.S. ___, 102 S.Ct. ___, 71 L.Ed.2d 188 (1982). No danger exists either that the Arkansas Commission and the Federal Energy Regulatory Commission (hereinafter, FERC) will be issuing contradictory rate orders. FERC has no jurisdiction over electric cooperatives, *Salt River Project Agricultural Improvement District v. Federal Power Commission*, 391 F.2d 470 (D.C. Cir. 1968), even though the Commission, while disclaiming jurisdiction, has itself recognized that government regulation of the generation cooperatives would be in the public interest. *Re Dairyland Power Cooperative*, 37 FPC 12, 67 PUR3d 340, 355 (1967).

The Congressional failure to place cooperatives like AECC under the FERC can hardly be interpreted as an expression of an intent that they go unregulated. The REA was not passed until 1936, one year after the FPA was passed. Congress could not be said to have had in 1935 any

intention of how to regulate the fledgling cooperative movement.

The subsequent Congressional silence, therefore, more clearly suggests a Congressional determination that this area does not require national regulation than it does an intention that the wholesale cooperatives go unregulated. Otherwise, the assertion by Arkansas and eleven other states of jurisdiction over generation cooperatives should have provoked Congress to pass legislation clearly prohibiting state regulation. *See, Brief of National Rural Electric Cooperative Association*, p. 1. Indeed, Congress moved into the area of utility rate regulation initially less because it concluded the subject matter required a uniform national policy, than because this Court had struck down state initiatives in a field where Congress believed some government regulation was essential.[7]

AECC argues, finally that state regulation conflicts with the REA.[8] Such conflict is unlikely since the REA and the State of Arkansas are attempting to achieve similar ends, rural electrification at reasonable rates. AECC suggests the close relationship between the Administrator of the REA and AECC precludes the need for state regulation. If this is true, then the states cannot regulate the distribution cooperatives or investor-owned utilities which also borrow under the REA, a position no one would seriously entertain. The lender-debtor relationship has simply never been seen as a surrogate for regulation and is little more viable here than it would be if the lender were a commercial bank.

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[7]The FPA was passed on the premise that "constitutional limits upon state regulatory power made federal regulation essential if major aspects of interstate transmission and sale were not to go unregulated." *The Colton Case*, p. 213.

[8]This argument rests largely on facts outside the record.

The Administrator's role in setting AECC's rates, is in this case, uncertain at best. In hearings on the REA before the House Committee on Interstate and Foreign Commerce, the then Administrator of the REA denied he had the power to fix rates "within the boundaries of a state." *Re Dairyland Power Cooperative, supra*, at 348.[9] In the hearing in this case before the Arkansas Commission, Mr. Louis Fish, AECC's General Manager, testified that AECC's rates were "essentially" set by its Board of Directors (J.A. 28). Counsel for AECC admitted AECC's sales of self-generated power to the distribution cooperatives were unregulated (J.A. 38-39). AECC acknowledges in its Brief that "it has not been necessary for the Administrator to exercise great control in matters such as ratemaking" (p. 27). The prospect of federal rate regulation, which, at most, is apparently what exists here, should not preempt the states. On point is a landmark case, *Smyth v. Ames, supra*. There the federal statute chartering the Union Pacific Company reserved to Congress the right to reduce the railroad's tariffs if its rate of return exceeded a certain level. Nebraska then passed a statute purporting to set rates for the shipment of freight between points within the State. Union Pacific challenged the State statute on the grounds that, among others, Congress had preempted the field of rate regulation. The Court, per Mr. Justice Harlan, although overturning the statute on other grounds, rejected this argument:

> It cannot be doubted that the making of rates for transportation by railroad corporations along public highways, between points wholly within the limits of the state, is a subject primarily within the control of that state. And it ought not to be supposed that

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[9]Shortly before passage of the REA, the Rural Electrification Administration was created by executive order and made "a very few small loans to proposed cooperatives." *Salt River Project Agricultural Improvement District v. Federal Power Commission, supra*, at n. 9. The Court there noted that REA strictly regulated the cooperatives, but that they had a "freer hand" when setting rates. *Id.* at 473.

> Congress intended that, so long as it forebore to establish rates on the Union Pacific Railroad, the corporation itself could fix such rates as it saw proper independently of the right of the states to prescribe regulations for transportation beginning and ending within their respective limits. *Id.* at 521-22.

The passage of almost a hundred years has cost Mr. Justice Harlan's reasoning none of its vitality. We suggest that consistent with *Smyth v. Ames, supra*, a virtually dormant federal power over the sale of electricity between Arkansas cooperatives for local consumption should not be allowed to preempt the police power of the state.

CONCLUSION

The decision of the Arkansas Supreme Court should be affirmed. The sale of electricity by AECC to distribution cooperatives is an essentially local matter properly subject to the police power of the State of Arkansas.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ARKANSAS ELECTRIC COOPERATIVE CORPORATION,

Appellant,

v.

ARKANSAS PUBLIC SERVICE COMMISSION,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF ARKANSAS

BRIEF FOR THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS AMICUS CURIAE IN SUPPORT OF THE ARKANSAS PUBLIC SERVICE COMMISSION

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INTEREST OF AMICUS CURIAE

The National Association of Regulatory Utility Commissioners (NARUC) files this brief as *amicus curiae,* urging affirmance due to the substantial harm a reversal of the decision below will have upon the effectiveness of the regulation of electric utilities by its member State regulatory commissions. The NARUC files this brief with the written consent of the Appellant and the Appellee.

The NARUC is a quasi-governmental nonprofit organization founded in 1889. Within its membership are the governmental bodies of the fifty States, and the governmental agencies of the District of Columbia, Puerto Rico, and the Virgin Islands, engaged in the regulation of utilities and carriers. The Arkansas Public Service Commission (APSC or the Commission), Appellee herein, is a member of the NARUC. The mission of the NARUC is to serve the public interest by seeking to improve the quality and effectiveness of public regulation in America.

More specifically, the NARUC contains the State officials charged with the duty of regulating electric utility companies within their respective borders. As such, these officials have the obligation to assure the establishment of electric utility services and facilities as may be required by the public convenience and necessity, and the furnishing of dependable service at rates that are just and reasonable. The State regulatory commissions are the creatures of their respective legislatures, established to regulate utilities excercising monopoly powers within their service territories.

Although the vast majority of electric utilities subject to regulation by State regulatory commissions are owned by private investors, at least twelve States (including the State of Arkansas) subject wholesale sales by generation and transmission (G&T) cooperative utilities to economic regulation in the public interest.[1] In these States, which would be most directly affected by a reversal of the ruling below, the legislatures have determined that the interests of the consumers of power produced by G&T cooperatives shall be protected through the mechanism of governmental regulation, and not through "self regulation". By this

[1]Brief of National Rural Electric Cooperative Association, at 1.

brief, the NARUC seeks the affirmance of these legislative policies.

The preemption issue presented the Court by the Appellant in its brief (and also suggested by the United States and the National Rural Electric Cooperative Association (NRECA) as *amici)* to the effect that State regulation of G&T cooperatives is preempted by the Rural Electrification Act, Title 1, § 4, ch. 432, 49 Stat. 1365 (1936) (codified at 7 U.S.C. § 904 (1978 & Supp. 1982)) calls into question the jurisdiction of the twenty-five States that regulate the distribution of electricity to the ultimate consumers of cooperative utilities.[2] Although the NARUC believes that this issue is not properly before the Court, should the decision of the Arkansas Supreme Court be reversed on the ground that the Rural Electrification Administration "occupies the field", continued retail regulation of distribution cooperatives will be threatened. Simply stated, the resolution of the issues raised in this case will affect State regulatory jurisdictions nationwide.

SUMMARY OF THE ARGUMENT

As framed in the Appellant's jurisdictional statement (J.S. i), this case presents the following question:

Whether the Commerce Clause of the United States Constitution[3] prohibits the State of Arkansas by and through its Public Service Commission from regulating

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[2]The States include Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Michigan, Nevada, New Hampshire, New Jersey, New Mexico, Oklahoma, Rhode Island, Texas, Utah, Vermont, Virginia, West Virginia and Wyoming.

[3]U.S. Const. Art. I., § 8, cl. 3.

rates at which a G&T cooperative sells electrical energy to local distribution cooperatives.

In support of the APSC, Appellee herein, the NARUC submits that the Commissions' assertion of jurisdiction over the rates of Arkansas Electric Cooperative Corporation (AECC) is not prohibited by the Commerce Clause as interpreted in decisions of this Court. Rather, the State regulation at issue clearly satisfies the criteria for testing the validity of State actions affecting interstate commerce described by the Court in *Pike v. Bruce Church,* 397 U.S. 137 (1970); the Commission's assertion of jurisdiction operates "evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental," and any burden imposed on such commerce is minor in relation to the local benefits. Because the decisions principally relied upon by Appellant, *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Company,* 273 U.S. 83 (1927) and *Federal Power Commission v. Southern California Edison Company,* 376 U.S. 205 (1964) are distinguishable from the facts presented in this case, the decision below should be affirmed.

The Appellant has raised a separate issue in its brief which was not included in the Jurisdictional Statement originally filed with the Court: Appellant argues that under the Supremacy Clause of the United States Constitution,[4] APSC regulation of its rates is preempted by Congress' enactment of the Rural Electrification Act, *supra.* The NARUC submits that pursuant to U.S. Sup. Ct. Rule 34.1(a), 28 U.S.C., which specifies that additional questions not presented in the Jurisdictional Statement may not be raised in the brief on the merits, this issue is not properly before the Court. *New York ex rel.*

[4]U.S. Const. Art. VI.

Rosevale Realty Co. v. Kleinert, 268 U.S. 646 (1925). Because this question was not decided below (J.A. 65-70), and because this preemption issue is separate from Appellant's Commerce Clause argument, it should not be considered by the Court.

The NARUC recognizes, however, that the provisions of Rule 34.1(a) are discretionary. Should the Court decide to consider the Appellant's preemption argument on the merits, the NARUC submits that regulation of Appellant's rates by the APSC is not preempted by the Rural Electrification Act (hereinafter, REA) or any other act of Congress. Congress has not "unmistakably ordained" that State regulation of Appellant's rates must give way to the regulatory scheme established by the REA, nor does the "nature of the regulated subject matter" require that preemption be implied. *Florida Lime and Avocado Growers v. Paul,* 373 U.S. 132 (1963). Rather, State regulation of the subject matter in question complements the purposes of the REA, which clearly does not "occupy the field" of electric cooperative regulation. Moreover, the decision of the Federal Power Commission declining to regulate wholesale sales of power by G&T cooperatives, *Re Dairyland Power Cooperative,* 27 F.P.C. 12, 67 P.U.R. 3d 340 (1967), creates a regulatory vacuum which the APSC may constitutionally fill.

ARGUMENT

I. REGULATION OF AECC'S RATES BY THE ARKANSAS PUBLIC SERVICE COMMISSION IS NOT PROHIBITED BY THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

It is undisputed that certain indistinguishable quantities of electrical energy sold by AECC to its customers are

generated outside of Arkansas, and necessarily travel in interstate commerce (J.A. 14-16, 52). This fact alone, however, does not establish that the decision of the APSC to assume jurisdiction "over the rates and charges of [AECC] for electricity furnished to its member cooperatives in the State of Arkansas" (J.A. 52) is prohibited by the Commerce Clause of the Constitution. Rather, this fact serves as the starting point for analyzing the validity of the APSC's order herein under review. In its decision in *Pike v. Bruce Church,* 397 U.S. 137 (1970), this Court described the criteria for testing the validity of the Commission's assertion of jurisdiction under Arkansas law:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Cement Co. v. Detroit,* 362 US 440, 443, 4 L.Ed.2d 852, 856, 80 S.Ct. 813, 78 ALR2d 1294. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

397 U.S. at 142.

The NARUC submits that the APSC's decision satisfies these criteria. First of all, it is clear that the APSC's regulation of AECC's rates is evenhanded. The Supreme Court of Arkansas found that AECC sells no power outside the State of Arkansas (J.A. 68). Furthermore, even if AECC possessed out-of-state customers, the

APSC has extended its jurisdiction solely to sales of electricity to Arkansas consumers. There is no evidence in this case of discrimination against any interstate customers of AECC.

Secondly, APSC regulation of AECC's rates effectuates a legitimate local public interest. It is beyond question that the subject matter of this controversy – the regulation of an essential service such as electricity – is a legitimate area for State regulation. In *Munn v. Illinois,* 94 U.S. 113 (1877), which upheld State regulation of the rates charged by grain elevators, the Court recognized the inherent authority of a State to exercise its police power to regulate goods and services "affected with the public interest." See also, *Rudd v. New York,* 143 U.S. 517 (1982) (upholding State regulation of the business of elevating, weighing and discharging grain from ships); *Brass v. Stoeser,* 153 U.S. 391 (1894) (upholding a North Dakota law fixing the maximum rates for grain storage); *German Alliance Insurance Co. v. Lewis,* 233 U.S. 389 (1914) (upholding Kansas' regulation of the fire insurance business); and *Nebbia v. New York,* 291 U.S. 502 (1934) (upholding State regulation of milk prices). There can be little argument that the regulation of rates for the sale of electricity by the State of Arkansas furthers a similar legitimate interest.

Next, the *Pike* analysis requires that permissible State regulation only incidently affect interstate commerce. The APSC, after reviewing the evidence presented by AECC, determined that the exercise of its jurisdiction has such an incidental effect (J.A. 63). This finding was affirmed by the Arkansas Supreme Court (J.A. 67). This conclusion is amply supported by the fact that the sales at issue occur entirely within the State of Arkansas. As the Commission determined, AECC's "reason for existence" is to generate, purchase, and transmit electricity for its members, all of

which are located within the State (J.A. 53-54). Instructive on this point is the Court's decision in *Panhandle Eastern Pipeline Co. v. Michigan Public Service Commission,* 341 U.S. 329 (1951), in which the Court held that the Commerce Clause did not prohibit the State of Michigan from requiring an interstate natural gas pipeline company to obtain a certificate of public convenience and necessity from the State's regulatory commission before making direct sales of natural gas to Michigan consumers. *Id.*, at 333. Despite the fact that the gas to be regulated had clearly traveled in interstate commerce before reaching the in-state customers, the Court found that the sales were "primarily of local interest"; therefore, the State's assertion of jurisdiction to regulate the sales was upheld. AECC's sales to its Arkansas consumers are also "primarily of local interest".

Finally, the *Pike* analysis requires that the benefits of local regulation be weighed against any burdens on interstate commerce. The benefits of local regulation of the rates which monopoly electric utilities charge their customers are substantial. Protection of consumers from excessive, unreasonable or discriminatory rates provides the basis for the very existence of independent, governmental agencies. Here, the Arkansas legislature, recognizing these benefits, has established the Commission to provide such protection in the public interest. Moreover, as we have argued, the burdens placed upon interstate commerce by the Commission's assertion of jurisdiction over wholly intrastate transactions are minimal. The remaining question is whether less burdensome means are available to foster the State's regulatory policies. AECC has contended that the Commission's undisputed authority to regulate the rates of its seventeen member cooperatives provides a practical mechanism for the Commission to in-

directly regulate AECC's wholesale sales (J.A. 79-80). In response to this contention, the NARUC submits that the Commission's decision to regulate AECC directly, rather than through its customers, will result in more efficient, and therefore less burdensome regulation. Given AECC's repeatedly expressed fear of the regulatory process (which purportedly leads to inadequate rate relief, compounded by regulatory lag and the expense of rate case litigation) (J.A. 79-80), the NARUC is surprised that the AECC prefers seventeen separate ratemaking proceeding to a single rate case in which the major issue of the cost of AECC-supplied power is determined.[5] As the Arkansas Commission stated, direct Commission regulation of AECC, by supplanting individual regulation of the seventeen distribution cooperatives, would lead to partial deregulation of the local cooperatives. (J.A. 82).

Although the APSC's decision satisfies the *Pike* criteria, AECC, NRECA and the United States argue that because the transactions in question constitute wholesale sales (sales for resale), they are beyond the authority of the Commission based on this Court's decisions in *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927) (*Attleboro*) and *Federal Power Commission v. Southern California Edison Co.*,

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[5]The NARUC believes that AECC's fear of the evils of State regulation are largely groundless. Pursuant to Ark. Stat. Ann. § 73-202.3 (Repl. 1973), the APSC is precluded from issuing orders which conflict with decisions of the Rural Electrification Administration. Moreover, pursuant to this Court's decisions in *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944) and *Bluefield Water Works & Improvement Co. v. Public Service Commission*, 262 U.S. 679 (1923), the Commission is constitutionally precluded from establishing confiscatory rate levels. The fact that AECC may incur expenses in litigation before the APSC is solely an unavoidable result of the legislature's decision to enact a system of regulation.

376 U.S. 205 (1964) (the *Colton* Case). As the Supreme Court of Arkansas decided, however, each of these cases is distinguishable from the case at bar.

In *Attleboro,* the Court was confronted with a different transaction than herein.[6] There, the Court held that the State of Rhode Island was constitutionally precluded from regulating rates at which a Rhode Island utility sold electricity to a Massachusetts utility for resale to Massachusetts consumers. Relying on its earlier decision in *Missouri ex rel. Barrett v. Kansas Natural Gas Co.,* 265 U.S. 298 (1924), the Court in *Attleboro* described this obviously interstate transaction as "national in character," and therefore beyond the authority of Rhode Island to regulate. The test used by the Court in reaching this conclusion was whether "the particular business which is regulated is essentially local or national in character." 273 U.S. at 90.

In contrast, the APSC has made no attempt to regulate the transaction at issue in *Attleboro,* i.e., the rates at which AECC purchases power from or sells power to out-of-state utilities. (J.A. 63). Rather, the Commission's jurisdiction would extend solely to sales of electricity within the State of Arkansas. The fact that these transactions are described as "wholesale sales" in no way detracts from their "essentially local" character, as the court below determined. (J.A. 68). In an area such as this in which Congress has not spoken (see *infra,* at III), the determination of the Arkansas Supreme Court should not be disturbed.

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[6]The United States acknowledges that "this case presents a situation one step removed from that in *Attleboro.*" Brief for the United States as *Amicus Curiae,* at 8.

Although factually similar, the *Colton* case is plainly irrelevant to the Commerce Clause issue. There, the Court held that the State of California could not regulate a sale of electricity from a California utility to a California municipality which in turn resold the power to its citizens, because State regulation was preempted by section 201(b) of the Federal Power Act, 16 U.S.C. § 824 (1978 & Supp. 1982), 376 U.S. at 210. Finding that certain immeasurable quantities of electricity sold to the city in California were generated outside California, the Court ruled that Congress, in enacting the Federal Power Act, had granted the Federal Power Commission (FPC) exclusive jurisdiction over the entire transaction.

The Court did not decide, however, that the California Public Utilities Commission was precluded from regulating this wholesale sale by the Commerce Clause of the Constitution. Instead, the Court ruled that wholesale sales of electricity *by utilities licensed by the FPC* are subject to exclusively Federal jurisdiction. Thus, as a matter of statutory construction, the Court drew a "bright line" between State and Federal regulation of the sales of utilities subject to the Federal Power Act, 376 U.S. at 215-216.

In contrast, AECC's sales of power to its distribution customers do not fall under the Federal Power Act. Both the Federal Power Commission, *Re Dairyland Power Cooperative,* 37 F P.C. 12, 67 PUR 3d 340 (1967), and the United States Court of Appeals for the District of Columbia Circuit, *Salt River Project v. Federal Power Commission,* 391 F.2d 470 (D.C. Cir. 1968), *cert. denied,* 393 U.S. 857 (1968), have determined that cooperatives such as AECC are exempt from FPC regulation. The NARUC submits that this distinction is crucial. Because Congress has not subjected AECC's rates to Federal jurisdiction, the

preemption analysis that provided the basis for the decision in *Colton* does not apply. Instead, the "essentially local" test announced in *Attleboro* must be used to determine the jurisdictional question at issue.

Unlike AECC, which argues in its brief that the *Colton* decision establishes a constitutional barrier to all State regulation of wholesale electric sales (AECC Brief, at 20-22), the United States apparently recognizes that the decision in *Colton* turned on the construction of the Federal Power Act. (United States Brief, at 9-10). The United States cites *Colton* for the proposition that because Congress granted exclusive jurisdiction to the FPC to regulate the wholesale sales of Federal licensees, wholesale sales of all electric utilities are, in the language of *Attleboro,* "national, and not local in character." (*Id.*) In effect, the United States argues that since Congress has placed some wholesale sales beyond State regulation, *Attleboro* requires that all State regulation of this sort be prohibited.

The NARUC believes that this argument proves too much. Recently this Court determined that the regulation of *retail* electric ratemaking was sufficiently national in character to permit the Congress to "pre-empt the States completely in the regulation of retail sales by electricity and gas utilities. . ." *Federal Energy Regulatory Commission v. Mississippi,* ____ U.S. ____ (1982), 50 U.S.L.W. 4566, 4569-70 (June 1, 1982), citing *F.P.C. v. Florida Power & Light Co.,* 404 U.S. 453 (1972). Yet, no one seriously contends that because Congress has partially regulated retail electric rates by enacting the Public Utility Regulatory Policies Act of 1978, Pub.L. No. 95-617, 92 Stat. 3117, (the statute under review in *FERC v. Mississippi, supra*), all State regulation of such rates is now pro-

hibited by the Commerce Clause.[7] The NARUC submits that Congress' apparent decision not to regulate electric cooperatives represents a decision to leave such regulation to the States.

II. THE ISSUE OF WHETHER THE REGULATION OF AECC'S RATES BY THE APSC IS PREEMPTED BY THE RURAL ELECTRIFICATION ACT IS NOT PROPERLY BEFORE THE COURT.

In its Jurisdictional Statement filed with this Court, AECC presented one question for review: whether APSC regulation of its rates was prohibited by the Commerce Clause of the Constitution. (J.S. i). In its brief, however, it raises a new, totally separate issue for review: whether under the Supremacy Clause of the Constitution, APSC regulation of its rates is preempted by the Rural Electrification Act, Title I, § 4, ch. 432, 49 Stat. 1365 (1936) (codified at 7 U.S.C. § 824) (1978 & Supp. 1982) (REA) (AECC Brief at i). The NARUC submits that under the Court's rules, this issue is not properly before the Court, and therefore should not provide the basis for reversing the decision below.[8]

Under U.S. Sup. Ct. Rule 34.1(a), a brief on the merits "may not raise additional questions or change the substance of the questions already presented" in the jurisdictional statement. The Court normally refuses to

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[7] Before the Arkansas Supreme Court, AECC did contend that "that which Congress may regulate (whether Congress exercises the power or not), may not be regulated by the States", citing the *Colton* case. (J.A. 76). Were this true, State regulation of virtually any sort (utility, insurance, antitrust, etc.) would be unconstitutional.

[8] *Amicii* NRECA (Brief, at 16-20) and the United States (Brief, at 10-13) join in this argument.

consider questions not properly presented to it. *New York ex rel. Rosevale Realty Co. v. Kleinert,* 268 U.S. 646 (1925); *San Antonio & A.P.R. Co. v. Wagner,* 241 U.S. 476 (1916). Rule 34.1(a) does permit, however, the consideration of "plain error" evident from the record. *Vachan v. New Hampshire,* 414 U.S. 478 (1974). In addition, under Supp. Ct. Rule 15.1(a), questions presented in a jurisdictional statement "will be deemed to comprise every subsidiary question fairly included therein".

The NARUC submits that the question of preemption under the REA is not "fairly included" in the Commerce Clause issue raised in AECC's Jurisdictional Statement, nor does its treatment below constitute plain error. First of all, AECC apparently did not believe that its Commerce Clause question included a subsidiary preemption issue. It did not cite the REA in its Jurisdictional Statement, or list the Act in its Table of Authorities. Only after the United States filed its Brief discussing the effect of the REA did this question arise before this Court." Moreover, these two questions clearly constitute separate issues. Commerce Clause analysis differs from preemption analysis, as AECC apparently recognizes by briefing these issues separately.

Finally, the treatment of the preemption issue by the Arkansas Supreme Court hardly constitutes plain error. That Court did not decide this question, instead limiting its resolution of the case to the Commerce Clause issue (J.A. 65-70). Moreover, the dissent did not address the preemption issue (J.A. 70-75), nor did AECC in its Petition for Rehearing (J.A. 75-80). Therefore, this Court should not reverse the Arkansas Court's decision based

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"Although the United States argues this issue (Brief, at 10-13), preemption does not appear as a "Question Presented" (Brief, at i).

upon an issue not determined by that Court. *Rosevale Realty*, 268 U.S. at 650.

The NARUC believes that this is not a minor, nitpicking point. A finding that the APSC is preempted by the REA will have a profound effect not only upon State regulation of wholesale cooperative sales of electricity, but also upon State regulation of retail electric cooperatives, as well as telephone cooperatives that are REA borrowers.

III. STATE REGULATION OF AECC IS NOT PREEMPTED BY THE RURAL ELECTRIFICATION ACT

Although the NARUC believes that this issue is not properly presented, the Court may disagree. Therefore, we address the merits of this issue.

AECC, NRECA and the United States each contend that because AECC borrows funds from the Rural Electrification Administration under the REA, Congress has preempted State regulation of its sales to its Arkansas customers. Each party recites the purposes of the REA, each explains the active supervision exercised by the Administrator of the Rural Electrification Administration over electric cooperatives, and each concludes that by the enactment of the REA, Congress has "occupied the field" as far as cooperative regulation is concerned. thereby excluding State regulation. None of these parties, however, can point to provisions of the REA, or regulations issued thereunder which provide evidence that Congress has either occupied the field or prohibited State regulation. The parties' preemption argument must fail.

In *Florida Lime and Avocado Growers v. Paul*, 373 U.S. 132, (1963), reh. den. 374 U.S. 858 (1964), (*Florida Lime Growers*) the Court described the test to be used to

determine if State regulation is preempted by an act of Congress:

> The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.

373 U.S. at 142

Applying this principle to the case at bar, it is clear that State regulation of AECC's rates is not preempted by the REA.

First of all, the nature of the subject matter – the rates at which an REA-financed cooperative sells electricity to its customers – does not establish the necessity of exclusive Federal regulation. AECC, NRECA, and the United States freely admit that State regulation of *retail* cooperatives is not preempted;[10] yet, there is no evidence that Federal regulation of retail cooperatives differs in any substantial way from Federal regulation of G&T cooperatives. If Federal regulation of retail cooperatives does not "occupy the field", it is difficult to understand why virtually identical Federal regulation of G&T cooperatives prohibits complementary State regulation. Acknowledged and longstanding State regulation of retail cooperatives provides ample proof that compliance with both Federal and State regulations is not "physically impossible", or that there is an "inevitably collision between the two schemes of regulation." *Florida Lime Growers*, 373 U.S. at 143.

[10]As noted *supra*, AECC offers State regulation of retail cooperatives as a plausible mechanism for the indirect regulation of its wholesale rates.

Moreover, at this point in the proceeding, conflicts between State and Federal regulation are purely hypothetical. AECC is forced to "imagine" that State regulation will impair its obligations under the REA (AECC Brief, at 27), while the United States believes that the "spectre of state regulation" and the "possibility" of collisions between the commands of the State and the REA (United States Brief, at 12-13) justify total preemption. These statements hardly describe "inevitable collisions" between the State and Federal schemes of regulation. Particularly at this time, when the APSC has merely asserted jurisdiction over AECC while acknowledging that it must yield to actual conflicts with the Rural Electrification Administration (J.A. 59), the *Florida Lime Growers* test does not permit preemption on the basis of conjecture or supposition.[11] *Id.*

Secondly, in the language of *Florida Lime Growers,* Congress has not "unmistakably ordained" that State regulation of G&T cooperatives such as AECC is impermissible. AECC, NRECA, and the United States offer no explicit statutory language evidencing a Congressional decision to oust the States from this field of regulation. Rather, each cites provisions of the REA which vest the Administrator with the authority to ensure that cooperative borrowers are able to repay their loans, and argues that *by implication,* this statutory authority precludes any State ratemaking jurisdiction. Obviously, this argument based upon implied preemption cannot

[11]Moreover, pursuant to Ark. Stat. Ann. § 73-202.3 (Repl. 1973), the APSC may not interfere with regulation under the REA. In addition, orders of the APSC which jeopardize the repayment of AECC's REA loans would raise issues of constitutional significance. See n. 5, *supra.*

satisfy the requirement that such preemption be unmistakably ordained.[12]

It is not surprising that there is no explicit, unmistakable evidence that Congress intended to displace State regulatoin of cooperative electric rates. As AECC recounts in its Brief (AECC Brief at 26-27), there are "distinct and obvious differences" between the purposes of State regulation and the REA. State regulation is aimed at protecting consumers from abuses of monopoly powers exercised within utility service territories; the REA was enacted to promote the development of rural electrification. AECC raises this difference as a justification for striking State regulation. As this Court stated in *Florida Lime Growers,* however, the fact that State and Federal regulations "are aimed at similar or different objectives" is not relevant to determining the question of preemption. 373 U.S. at 412. Because State regulation of AECC's rates complements REA regulation in the same manner that it complements Federal regulation of retail cooperatives, because there are no current conflicts between the two systems of regulation, and because Congress has not unmistakably ousted State regulation of G&T cooperatives, the APSC's assertion of jurisdiction over AECC is not preempted by the REA.

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[12]Moreover, this argument applies with equal force to State regulation of *retail* cooperatives, which the parties admit is permissible.

CONCLUSION

Although AECC, NRECA and the United States seek only to remove State regulation of G&T cooperatives selling power for resale, their arguments sweep broadly, threatening State regulation at its core. Their claim that the Commerce Clause precludes State regulation of these wholesale transactions applies with equal force to State regulation of retail sales of power. Similarly, their argument that the APSC is preempted by the REA would deny State regulation of retail cooperative rates. As this Court has recently stated, the entire electric utility business is "in commerce", and therefore a fit subject for exclusive Federal regulation. *FERC v. Mississippi, supra.* Yet, Congress has not restruck the balance between State and Federal jurisdiction over this important industry by amending the Federal Power Act, the Rural Electrification Act or any other statute. Unless and until it does, the sale of electricity by AECC to its customers remains an essentially local concern subject to the authority of the State of Arkansas.

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No. 81-731

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ARKANSAS ELECTRIC COOPERATIVE CORPORATION,
Appellant,

v.

ARKANSAS PUBLIC SERVICE COMMISSION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF ARKANSAS

BRIEF FOR THE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE ARKANSAS ELECTRIC COOPERATIVE CORPORATION

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INTEREST OF AMICUS CURIAE

The National Rural Electric Cooperative Association (NRECA) files this brief as *amicus curiae*, urging reversal because of the substantial harm to its member cooperatives threatened by the decision below. This filing is with the written consent of the appellant and the appellee.

The NRECA is a not-for-profit entity incorporated and existing under the laws of the District of Columbia. It is the national service organization for some 1,000 rural electric cooperatives. These member cooperatives serve more than 25 million consumer-owners throughout the United States. They own and maintain nearly 44% of the nation's electric distribution lines and distribute about 11% of its electricity.

Fifty-two of NRECA's members are generation-and-transmission (G&T) cooperatives actively engaged in providing wholesale bulk power supply to distribution cooperatives which are their member-owners. These G & T cooperatives are most directly affected by the decision below. In addition to Arkansas' regulation challenged in this case, eleven other states assert jurisdiction over the wholesale sales of at least eighteen such cooperatives.[1]

Without exception, the member distribution cooperatives which purchase their power supply from G&T cooperatives participate in the management of their suppliers. As member-owners, the distribution cooperatives establish the rates for their power supply purchases. Because the distribution cooperatives are, themselves, in turn, owned by individual consumer-members, the ultimate customers effectively set their own wholesale rates. The established

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[1]The states include Alaska, Arizona, Colorado, Iowa, Indiana, Kansas, Kentucky, Michigan, Missouri, New Mexico, and Texas, as well as Arkansas. It appears that Iowa, Missouri, and Texas do not regulate the rates of all G & T cooperatives within their borders.

practice is that G&T cooperative wholesale rates are limited to recovering costs and breaking even. Development of equity has been minimal or nonexistent. This means that any delays in passing on power supply costs through wholesale rates rapidly erode the G&T cooperatives' cash positions and can severely impair their operations. *See e.g., Tri-State Generation & Transmission Association, Inc. v. Public Service Commission of Wyoming*, 412 F.2d 115 (10th Cir. 1969), *cert. denied*, 397 U.S. 1043 (1970). The problem becomes particularly great with rapid cost escalation in the electric utility industry, requiring frequent rate increases to recover those costs. With state wholesale rate regulation, G&T cooperatives face one or more rate cases each year to keep up. Moreover, not only does the need for regulatory approval of each rate adjustment prevent the timely recovery of costs, the rate cases are, themselves, expensive to litigate.

This wasteful regulation of rates set by consumer-owners is even more egregious in view of the comprehensive supervision of the cooperatives by the federal Rural Electrification Administration (REA). Among other things, the REA Administrator must approve each wholesale rate of a G & T cooperative borrower before that rate goes into effect. The Administrator cannot limit his rate review merely to preserving the security interest of the federal government in power supply loans: His mandate requires also that he ensure the continued vitality of the rural electrification program. *E.g., Public Utility District No. 1 of Pend Orielle County v. United States*, 417 F.2d 200, 201-02 (9th Cir. 1969). Since the distribution cooperatives are the heart of this program, it is the Administrator's duty to ensure that the activities of G & T cooperatives, including their wholesale power supply rates, promote the distribution cooperatives' mission: namely, electrification of rural areas at the lowest feasible cost.

This state regulation violates the Commerce Clause and the Supremacy Clause of the United States Constitution, as this brief explains.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case presents the following question:

Whether an Arkansas statute, authorizing state regulation of rates charged by a G&T cooperative for electric power and energy drawn from three interstate power pools, and sold at wholesale to local distribution cooperatives for resale within the state, violates the Commerce Clause[2] and trenches upon a field occupied by the Federal Power Act and the Rural Electrification Act and, therefore, violates the Supremacy Clause.[3]

The position of the NRECA supports the Appellant's conclusion that the Arkansas Supreme Court judgment in this case should be reversed because it offends both the Commerce Clause and Supremacy Clause of the United States Constitution.

The Arkansas statute violates the Commerce Clause in that it places a direct burden upon a transaction between an REA-financed G & T cooperative and an REA-financed distribution cooperative which is a wholesale sale of electric energy in interstate commerce that is national in character. This Court, beginning with *Public Utilities Commission v. Attleboro Steam & Electric Company*, 273 U.S. 83 (1927) [hereinafter cited as *Attleboro*] and ending with *New England Power Company v. New Hampshire*, ___ U.S. ___, 102 S.Ct. 1096 (1982) has consistently held that the sale of electric energy at wholesale in interstate commerce is national in character and, as such, rate regulation by a state regulatory commission is an "imposition of a direct burden upon interstate commerce, . . .[and] it must necessarily fall regardless of its purpose." *Attleboro* at 88. Therefore, if this area is to be regulated, it must be by the federal government.

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[2]U.S. Const. Art. I, § 8.

[3]U.S. Const. Art. VI.

In fact, the federal government does regulate this area. Since 1936, it has been the will and intent of Congress to bring electricity to rural America. The vehicle which Congress chose to carry out its will was the REA. It is clear, from the Rural Electrification Act and the forty-year history of rural electrification, that Congress intended the REA and its Administrator to exercise extensive and almost unlimited control over its borrowers. The REA controls all aspects of a borrower's corporate activity. This supervision is so pervasive that the Federal Power Commission (FPC) recognized it had no authority to regulate REA-financed G & T cooperatives. *Re Dairyland Power Cooperative*, 27 F.P.C. 12, 67 P.U.R.3d 340 (1967). This field had already been occupied by the REA, leaving no room for concurrent regulation.

ARGUMENT

I

Arkansas Electric Cooperative Corporation's Sales of Bulk Power Supply to its Retail Distribution Cooperative Members Are Made From Three Interstate Power Pools: They Are Sales "In Interstate Commerce," Not Merely Transactions Which Incidentally "Affect Interstate Commerce."

Both the Arkansas Public Service Commission (APSC) and the Arkansas Supreme Court misperceived the significance of the testimony presented on the interstate foundation of Arkansas Electric Cooperative Corporation's (AECC) bulk power supply activities by failing to recognize that, in fact, AECC's sales to its distribution cooperative members are made from three separate and distinct interstate pools of power and, at times, from power interchanged between or among these pools. The only testimony submitted on this subject was that of Mr. Louis Fish, Assistant General Manager of AECC for Engineering and Planning (J.A. 13-17).

One of the three pools is the Middle South Utilities (MSU) pool, which provides power from generating and transmission resources in Arkansas, Louisiana, Mississippi, and Missouri. In Arkansas, MSU covers most of the state, except for a strip near the western boundary of the state, including Fayetteville and Texarkana, where the Southwestern Electric Power Company (SWEPCO) has facilities and an area in northern Arkansas in which the Southwestern Power Administration (SPA) operates.

AECC owns generation located in the MSU pool area.[4]

[4]At the time of the hearing before the Arkansas Public Service Commission, the White Bluffs and Independence plants were not yet in operation. AECC owns portions of the four generating units at these plants (the remaining portions of the units are owned by Arkansas Power & Light Company and others), some of which are now in operation and are also dispatched by Middle South as part of the pool or "control area."

That generation is not even connected to its wholesale customer's load centers (J.A. 16, 34). Rather, AECC's generation in this area delivers its output into a high-voltage transmission system owned and operated by Arkansas Power & Light Company (AP&L),[5] one of the five participants in the MSU pool. AP&L's transmission system is, in turn, interconnected with those of its sister companies in the MSU pool and is operated as part of the MSU "control area" (J.A. 14-16, 34). AECC's McClellan plant, located in this area at Camden, Arkansas, is not dispatched by AECC to meet the loads of its members. Rather, the dispatching is delegated to the MSU dispatcher, and the plant is dispatched along with all the other MSU operating company generators under his control (J.A. 16, 34). These are the generators of AP&L, Louisiana Power & Light Company (LP&L), Mississippi Power & Light Company (MP&L), New Orleans Public Service, Inc. (NOPSI), and Arkansas-Missouri Power Company (Ark-Mo).

A large part of the power supplied to AECC's members is capacity and energy purchased from AP&L (J.A. 14, 26) and has already been held to be "in interstate commerce" because it is, in fact, supplied by the MSU pool. *Arkansas Power & Light Company v. Federal Power Commission*, 368 F.2d 376 (8th Cir. 1966). The second interstate pool with which AECC deals is formed by the generating and transmission resources of the three-state SWEPCO system, which maintains generation and transmission facilities in western Arkansas, as well as in portions of Texas and Oklahoma (J.A. 14, 17). AECC's principal generating resource located in the SWEPCO pool area is a portion of the jointly-owned Flint Creek plant at Gentry, Arkansas.

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[5] AECC owns only a small amount of relatively low-voltage transmission in the eastern part of the state, which interconnects some of its load centers but does not serve to connect them directly with AECC's generating resources (J.A. 16, 25, 27).

This generator is dispatched by SWEPCO's dispatcher along with all of SWEPCO's other units in the three-state area, and its output is delivered into SWEPCO's transmission grid where it is commingled with the pooled generation of three states (J.A. 14). All of AECC's members located in SWEPCO's area of western Arkansas are ordinarly served from SWEPCO's grid, from a pool of power generated in those three states. Mr. Fish testified that when the Flint Creek plant, which has only one generating unit, was not in operation, all the power on the portion of SWEPCO's grid in Arkansas came from out of state, since the Flint Creek unit was the only unit SWEPCO operated in Arkansas. This situation will frequently occur, because it is not unusual for a large base-load, coal-fired generator such as the Flint Creek unit to be off line for as much as 35% to 40% of the time as a result of forced outage and maintenance requirements.[6]

The third interstate pool is the four-state system of the federally-owned SPA, which sells power from an integrated hydro-electric power system in northern Arkansas, Missouri, Oklahoma, and Texas (J.A. 14-15). AECC has several contracts for power supply purchase from SPA (J.A. 14-15, 34). SPA also dispatches AECC's Bailey and Fitzhugh plants at Augusta and Ozark, Arkansas, and the output is delivered into the four-state SPA grid (J.A. 14-15).

Finally, from time to time, for economic reasons or to meet emergency or maintenance needs in any one of these three pools, AECC directs interpool transfers which permit its generating resources in one pool to serve its members' loads in the area of another pool (J.A. 15-17).

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[6]See FPC, *1970 National Power Survey*, Part 1, P. I-5-10, U.S. Government Printing Office, December, 1971; *Prevention of Power Failures*, A Report to the Federal Power Commission by the Advisory Committee on the Reliability of Electric Bulk Power Supply, U.S. Government Printing Office, June, 1967, pp. 1, 2.

The test of federal jurisdiction under the Federal Power Act is whether a wholesale sale is "in interstate commerce" rather than one merely "affecting interstate commerce." Federal Power Act §201(a), 16 U.S.C. §824; *Jersey Central Power & Light Company v. Federal Power Commission*, 319 U.S. 61, 70 (1943). There have been a number of cases involving a variety of factual situations in the complex bulk power supply business in which the "in interstate commerce" standard has been used to define the extent of Federal Power Act jurisdiction. These cases may also be used to determine whether transactions are "in interstate commerce" for the purposes of determining the Commerce Clause's limit on the states' power to regulate.

In these cases, the fact that both the bulk power supply buyer and the seller are located in the same state has never been held to destroy the interstate character of a sale of bulk power supply if the energy sold has a beginning or ending in an interstate trip, *United States v. Public Utilities Commission of California*, 345 U.S. 295, 297 (1953); *Federal Power Commission v. Southern California Edison Company*, 376 U.S. 205 (1964) [hereinafter cited as *Colton*], or was received from or delivered to an interstate pool of power. *Pennsylvania Water & Power Company v. Federal Power Commission*, 343 U.S. 414, 420 (1952); *Arkansas Power & Light Company v. Federal Power Commission*, 368 F.2d 376 (8th Cir. 1966). In the latter case, the 8th Circuit Court of Appeals recognized that AP&L's generators were dispatched along with those of its sister companies in the MSU system and that the generation and transmission facilities in the entire MSU area were operated as a single "control area" forming an interstate pool, exchanging power with other pools, and drawing on many other control areas in other states for automatic pool assistance in case of emergency.

Under modern technology, which almost invariably relies on large-scale generating units of 300,000 kw to

1,200,000 kw in size, tied into regional grids by high-voltage or extra high-voltage transmission lines, almost all bulk power supply in the continental United States is "in interstate commerce."

As explained in the Federal Energy Regulatory Commission's (FERC) recently-published report, *Power Pooling in the United States*,[7] electric bulk power supply facilities in this country are interconnected into three networks: 1) the Eastern Interconnected System (EIS); 2) the Western Interconnected System (WIS);[8] and 3) the Texas Interconnected System (TIS). Of these, only TIS, through a careful shaping of its members' operations, historically has avoided being "in interstate commerce" and, thus, has avoided FERC regulation. See *West Texas Utilities Corporation v. Texas Electric Service Company*, 470 F. Supp. 798 (N.D. Tex. 1979).

For operating purposes, the interconnected electric utilities[9] in the EIS, extending from the Eastern Seaboard to the Plains states are divided into 99 control areas which constantly strive to balance generation and load (separately for each control area) and enter into exchanges with other areas. *Power Pooling Report*, pp. 3, 26, 29. One of

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[7]FERC, Office of Electric Power Regulation, Washington, D.C. (December, 1981) pp. 25-32 (cited hereinafter as *"Power Pooling Report"*). The Report was published pursuant to Section 205(b) of the Public Utilities Regulatory Policies Act (PURPA). 16 U.S.C. §824(a)-1(b).

[8]Forty G&T cooperatives are located within, interconnected with, and operate normally-in-parallel with the EIS; ten within the WIS operate in the same relationship with that interconnection; hence all these G&T cooperatives operate "in interstate commerce."

[9]A small number of utilities remain isolated from this network, and, therefore, their operations are entirely local in nature. *See, e.g., Power Pooling in the South Central Region*, FERC Office of Electric Power Regulation, Washington, D.C., February, 1981, at p. 11, Table 1. This Report was published pursuant to Section 205(b) of PURPA, 16 U.S.C. §824(a)-1(b).

these 99 is the MSU control area; another is the SWEPCO control area; and a third is the SPA control area.

Both the Commission and the Arkansas Supreme Court recognized the importance of the distinction between "in interstate commerce" and "affecting interstate commerce" (J.A. 61-63, 67-69). The Public Service Commission's finding that AECC's wholesales of bulk electric power supply "begin and end here in Arkansas" (J.A. 63) simply does not square with the only testimony of record. The finding that there are only "incidental" interstate sales (J.A. 67) is mere *ipse dixit* wholly unsupported by record evidence. Surely AECC's bulk power supply arrangements would be wholly unsatisfactory if it relied only on isolated generating units which are subject to emergency forced outage and lengthy maintenance outages. It is not simply fortuitous that AECC, like other G&Ts throughout the country, and private utilities as well, does not seek to supply its customers firm bulk power supply from isolated units in Arkansas, as the Commission apparently assumed, ignoring the record evidence to the contary, but relies, instead, on an interconnected system or pool of power so that continuity of service may be maintained by reserve generating capacity in other states and made as economical as possible through economic dispatch[10] as part of an interstate pool. It was error for the Commission, without any record support, to find these kinds of imports of emergency and replacement power from out of state (or power dispatched from generators in other states for reasons of economy) to be only "incidental" to AECC's business.

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[10]Economic dispatch is the selection of generators under the control of the dispatcher to meet the control area requirements at the least cost. See *Arkansas Power & Light Company v. Federal Power Commission*, 368 F.2d at 378; *Power Pooling Report*, n. 3 *supra*, at p. 27.

II

An Arkansas Statute, Authorizing State Regulation of Rates Charged by a G&T Cooperative For Electric Power and Energy Drawn From Three Interstate Power Pools, and Sold at Wholesale to Local Distribution Cooperates For Resale Within the State, Violates Both the Commerce Clause and the Supremacy Clause of the United States Constitution.

From the foregoing discussion, it has been shown that the transactions between AECC and its members are wholesale transactions in interstate commerce. Both AECC and the APSC are in agreement as to this conclusion. The APSC, in its argument, has not attempted to contend that this transaction is not a sale of energy at wholesale, nor does it contend that the transaction is not in interstate commerce. (J.A. 14, 52). The only remaining Commerce-Clause question is whether a state regulatory commission can regulate such a transaction.

A state cannot regulate wholesale transactions in interstate commerce if such regulation is a direct burden on interstate commerce. Such regulation is a direct burden if the transaction to be regulated is "national in character." *Attleboro*, 273 U.S. 82 (1927).

It is at this point that the parties disagree and take separate paths to their conclusions as to whether the state of Arkansas may regulate this transaction. The APSC takes the position that while the transaction is a wholesale sale and in interstate commerce, Arkansas is not prohibited from regulating this transaction because it is local in character.

To follow this argument, it is necessary for the APSC to ignore the *Attleboro* line of decisions and the legislative intent of Congress in adopting Part II of the Federal Power Act, as well as the legislative intent found in the Rural

Electrification Act. Not only is the legislative intent of Congress ignored, but decisions of this Court in such cases as *Colton* are also ignored. In the final analysis, the APSC, as well as the Arkansas Supreme Court, is attempting to rejuvenate the opinion of the 9th Circuit Court of Appeals in the *Colton* case, which the APSC concedes is "factually similar to the present case." (Motion to Dismiss at 9, 10). After acknowledging the interstate character of the transaction, as well as the wholesale sale, the 9th Circuit Court of Appeals held, in that case, that the Federal Power Commission (FPC) had no jurisdiction because state regulation of the interstate sale at wholesale was permissible under the Commerce Clause. *Southern California Edison Company v. Federal Power Commission*, 310 F.2d 784 (9th Cir. 1962).

In light of the Supreme Court's reversal of the Circuit Court of Appeals' decision in the *Colton* case, it is now apparent that a transaction such as between AECC and its member systems must be considered matters of national interest, and if it is to be regulated, it must be by the federal government to the exclusion of the state.

In the absence of the factual difference between the corporate structure of AECC and that of an investor-owned utility providing energy to its wholesale and retail customers, there would be no room for argument that the transaction of AECC would not be subject to the jurisdiction of the FERC and, therefore, would not be a matter of national interest. The fact that AECC is a not-for-profit, cooperatively-owned corporation borrowing money from or through the REA provides the one factor distinguishing this case from such cases as *Colton* and *Public Service Company of Indiana v. Federal Power Commission*, 375 F.2d 100 (1967). The APSC has latched onto this factual difference and attempted to argue that a case-by-case analysis of whether a national or local interest exists should be controlling in resolving the right of the APSC to regulate the rates of AECC. In resolving this

issue, we must look to the intent of Congress in filling the regulatory void created by *Attleboro*.

For the moment, it might be helpful to not distinguish AECC as being a corporate entity different than an investor-owned utility providing power and energy to its wholesale and retail customers. It is then only necessary to retreat to the *Attleboro* case in order to find the cornerstone upon which the Supreme Court's decision in the *Colton* case is based.

The Court, in *Attleboro*, held that the Rhode Island Public Service Commission could not regulate the wholesale rate at which a Rhode Island utility sells electric energy to a Massachusetts utility. As a result of the regulatory void created by *Attleboro*, Part II of the Federal Power Act was passed by Congress in 1936 in order to give the FPC (now the FERC) control over the interstate exchange of electric energy.

To determine the extent of this federal regulatory power, Congress adopted the "test developed in the *Attleboro* line which denied state power to regulate a sale 'at wholesale to local distributing companies' and allowed state regulation of a sale at 'local retail rates to ultimate consumers.'" *Colton*, 376 U.S. 214, 215, quoting *Illinois Natural Gas Company v. Central Illinois Public Service Company*, 314 U.S. 498, 504 (1942). Also see *Public Utilities Commission of California v. United States*, 355 U.S. 534 (1958); *United States v. Public Utilities Commission of California*, 345 U.S. 295 (1953); *Connecticut Light and Power Company v. Federal Power Commission*, 324 U.S. 515 (1945); *Missouri ex rel. Barrett v. Kansas Natural Gas Company*, 265 U.S. 298 (1924) [hereinafter cited as the *Kansas Natural Gas Case*]; *Pennsylvania Gas Company v. Public Service Commission*, 252 U.S. 23 (1920); *Arkansas Power and Light Company v. Federal Power Commission*, 368 F.2d 376 (8th Cir. 1966). Put succintly, "Congress meant to draw a bright line easily ascertained between state and federal jurisdiction...." *Colton*, 376 U.S. at 215. The Supreme

Court, in deciding the *Colton* case, found the legislative intent of Congress to be that all wholesale sales in interstate commerce are declared to be of national interest and, therefore, subject to the jurisdiction of the FPC. Justice Brennan, writing for the Court, held, in part:

> In short, our decisions have squarely rejected the view of the Court of Appeals that the scope of FPC jurisdiction over interstate sales of gas or electricity at wholesale is to be determined by a case-by-case analysis of the impact of state regulation upon the national interest. Rather, Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary such case-by-case analysis. This was done in the Power Act by making FPC jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States. *Id.*

Moreover, this Court has consistently read Part II of the Federal Power Act as a manifestation of Congress's answer to *Attleboro* and has said that "Part II is a direct result of *Attleboro*. They are to be read together. The latter left no power in the states to regulate licensees' sales for resale in interstate commerce, while the former established federal jurisdiction over such sales." *United States v. Public Utilities Commission of California*, 345 U.S. 295, 311 (1953). *Attleboro* told us that "[t]he test of the validity of a state regulation is not the character of the general business of the company, but whether the particular business which is regulated is essentially local or national in character;...." *Attleboro*, 273 U.S. at 90. *Attleboro*, in discussing *Kansas Natural Gas Co. Case*, 265 U.S. 298 (1924), said that:

> '[T]he commerce clause of the Constitution, of its own force, restrains the States from imposing direct burdens upon interstate commerce,' and a state enactment imposing such a 'direct burden' must fall, being a direct restraint of that which in the absence of Federal regulation should be free....

Attleboro, 273 U.S. at 88, quoting *Minnesota Rate Cases (Simpson v. Shephard)*, 230 U.S. 352, 396 (1887). The Attleboro Court went on to say that:

> [T]he sale and delivery to the distributing companies was 'an inseparable part of a transaction in interstate commerce—not local but essentially national in character—and enforcement of a selling price in such a transaction places a direct burden upon such commerce inconsistent with that freedom of interstate trade which it was the purpose of the commerce clause to secure and preserve;'. . . .*Attleboro*, 273 U.S. at 88, quoting *Kansas Natural Gas Co. Case*, 265 U.S. 298, 308.

The Court recently iterated the position that the states cannot regulate wholesale sales of electricity flowing in interstate commerce in *New England Power Company v. New Hampshire*, ___ U.S. ___, 102 S.Ct. 1096 (1982). There, the Court stated that Part II of the Federal Power Act "was a 'direct result' of this Court's holding in [*Attleboro*], that the states lacked power to regulate the rates governing interstate sales of electricity for resale." *Id.* at 1011.

Therefore, the regulation of AECC wholesale rates by the APSC, "[b]eing the imposition of a direct burden upon interstate commerce, from which the State is restrained by the force of the Commerce Clause,. . . must necessarily fall, regardless of its purpose." *Attleboro*, 273 U.S. at 89.

Subsequent to the *Attleboro* decision, Congress responded by enacting not only the Public Utility Act, of which the Federal Power Act was Title II, but also the Rural Electrification Act. 7 U.S.C. 901, et seq. The Federal Power Act was intended by Congress to provide regulation over extensive abuses by investor-owned utilities providing electric energy to their wholesale and retail customers. The legislative history revealed, in detail, the desperate need for regulation over such utilities. However, the legislative

history did not reveal that rural electric cooperatives were given the same congressional concern when the Federal Power Act was promulgated. The Rural Electrification Act was, at the same time, pending in committee and was later adopted. The two Acts provided solutions to diverse problems and created supervisory agencies to deal with the inherently different entities. The purpose of the REA was fundamentally to provide electric energy to rural America, which must be considered to be of national interest.

In creating the REA, Congress empowered the Administrator of such agency with broad authority to regulate and supervise rural electric cooperatives borrowing funds from or through such agency. In many respects, the supervision and regulation by the Administrator of the REA over electric borrowers is more complete and comprehensive than regulation of the FERC over its jurisdictional utilities. *Salt River Project Agricultural Improvement and Power District v. Federal Power Commission*, 391 F.2d 470 (D.C. Cir.) *cert. denied*, 393 U.S. 857 (1968). Some thirty years after the adoption of the Rural Electrification Act and the Federal Power Act, the FPC decided the issue as to whether rural electric cooperatives generating and transmitting electric energy for sale at wholesale to their member systems should be under the jurisdiction of the FPC. In the case of *Re Dairyland Power Cooperative*, 27 F.P.C. 12, 67 P.U.R.3d 340 (1967), Dairyland Power Cooperative of LaCrosse, Wisconsin, and two other G&T cooperatives, were ordered by the FPC to show cause why they should not be required to comply with this Commission's reporting, accounting and rate schedule filing requirements. Therefore, the issue was whether rural electric cooperatives were subject to regulation by the FPC under the Federal Power Act. The FPC, after extensive hearings, held:

> In our opinion, Congress never intended this commission to regulate co-operatives under the Federal Power Act. This intention is reflected in the

> legislative history of the Federal Power Act, is confirmed by the legislative history of the Rural Electrification Act, is strengthened by subsequent expressior by the Congress, and is ratified by this commission's legislative interpretation. Over the past thirty years, these factors compel the conclusion that co-operatives financed by REA are not public utilities within the meaning of Part II of the Federal Power Act. *Id.* at 343, 344.

Subsequent to the *Dairyland* case, the D.C. Circuit, in the case of *Salt River Project v. Federal Power Commission*, 391 F.2d at 473, 476, 477, held:

> Through its lending authority REA exercises extensive supervision over the planning, construction and operation of the facilities it finances. The REA borrower as a condition of securing its loan must secure REA approval of its manager, engineer and counsel; of its construction contracts and contracts for purchase of materials, equipment and supplies; of its contracts for purchase and sale of power; of its insurance coverage, its purchase of land, and so on. Moreover, REA's concern is not only with providing high standards of electric service and guaranteeing its loan, but also with reducing the cost of service to the cooperative's consumers. It furnished retail rate schedules designed for rural use and assists distribution cooperatives in obtaining electric energy at reasonable costs.
>
> Though REA regulation and supervision of cooperatives are, in many respects, far more comprehensive than those which the Federal Power Commission exercises over investor-owned utilities, there are certain areas, such as rate-making, where the cooperatives enjoy a freer hand. But it is in these areas that, by their structural nature, the cooperatives are effectively self-regulating. They are completely owned and controlled by their consumer-members, and only consumers can become members. They are non-profit.

The Court further held:

> For if REA cooperatives were to be made subject to Commission jurisdiction, Commission conflict with the authority of the Rural Electrification Administration was inevitable. Consequently this apparent indifference indicates that those entities under the Administrator's jurisdiction—the REA-financed cooperatives—were not intended to fall within that of the Commission. If anything the emphasis in Congress was on the Administrator's need for 'almost unlimited discretion' and 'extraordinary power' if he were to oversee effectively the rural electrification program.
>
> * * *
>
> And though there have been amendments to the Federal Power Act introduced in Congress, some of which would have impinged on REA jurisdiction and others of which would have proclaimed its independence, none has been enacted. Petitioners argue that Congress' inaction in affirming the independent status of REA cooperatives vis-a-vis the Federal Power Commission indicates that legally no such independence exists. But though it is hazardous to draw any conclusion from congressional inertia, particularly with respect to a variety of bills with diverse objectives, we think that, if anything, Congress' inaction here tends to demonstrate its endorsement of the long continued administrative practice of the agencies in operating independently of each other.

Considering that over forty years have passed since the enactment of the Federal Power Act and the Rural Electrification Act, it seems apparent that Congress is satisfied with the long-established practice of the two agencies operating independently of each other. It is quite clear from the *Dairyland* case that Congress intended for the REA, through the Administrator, to exercise extensive and almost unlimited control over the rural electric cooperatives which are borrowers under the Act. One is

forced to the conclusion that Congress occupied the field of regulation over the rural electric cooperatives such as AECC, and in such transactions, as in the instant case, such regulation is to the exclusion of the states.

The APSC attempts to skirt the federal regulation by arguing that the transaction should be considered under the Commerce Clause alone, on a case-by-case approach, as to national and local interests. Even if the APSC's argument were valid, which we do not concede, the argument must still fall under the principles established in *Attleboro*—that states are denied the power to regulate a wholesale transaction in interstate commerce. Vitality of the *Attleboro* decision is found in *New England Power Company v. New Hampshire*, 102 S.Ct. 1096. Accordingly, the argument of the APSC must fall, whether considered in light of occupation of the field of federal regulation by the REA or that the transaction should be considered in light of the constitutional considerations under the Commerce Clause. Even in the latter case, the holdings of this Court in *Attleboro* and *New England Power Company v. New Hampshire*, 102 S.Ct. 1096, will control, leaving the matter of regulation of wholesale transactions in interstate commerce a matter of national concern.

CONCLUSION

The Judgment of the Supreme Court of Arkansas should be reversed in that it holds that a State regulatory commission can regulate the interstate wholesale transactions between an REA-regulated power supply borrower and its member systems.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1981

ARKANSAS ELECTRIC COOPERATIVE CORPORATION,
APPELLANT

v.

ARKANSAS PUBLIC SERVICE COMMISSION

ON APPEAL FROM THE SUPREME COURT OF ARKANSAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether an Arkansas statute that authorizes the Arkansas Public Service Commission to regulate wholesale rates charged by electric cooperatives violates the Commerce Clause as applied to a cooperative that sells electricity, some of which is purchased from out-of-state suppliers, at wholesale to local distribution cooperatives within the state.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Appellant Arkansas Electric Cooperative Corporation is a nonprofit cooperative corporation, whose members are 17 distribution electric cooperative corporations located in Arkansas (J.S. App. A-1, A-11). Appellant generates electric power at four plants in Arkansas and also purchases power at wholesale from several utility companies, including Arkansas Power

& Light Company (AP & L), Southwest Electric Power Company (SWEPCO) and Southwestern Power Administration (SPA) (*id.* at A-3). This purchased power is generated at facilities located in Oklahoma, Missouri, Texas and Arkansas and is transmitted to appellant through a multi-state integrated grid; it thus is impossible to identify the source of the electric energy purchased by appellant (*id.* at A-6).

The power that appellant generates and purchases is sold by appellant at wholesale to its members, who, in turn, sell the power to their customers, the ultimate consumers of the electricity (J.S. App. A-1 to A-2, A-11 to A-12). In addition, appellant occasionally sells its surplus electricity at wholesale to AP & L and SPA. That power enters multi-state grids maintained by those utilities and may be transmitted and consumed outside the State of Arkansas (*id.* at A-2, A-6). Thus, although the relative amounts cannot be ascertained, it must be assumed that some of the electricity distributed by appellant originates out-of-state and is transmitted out-of-state (*id.* at A-12).

Since 1950, appellant has either borrowed directly, or received loan guarantees, from the Rural Electrification Administration (REA) in excess of $700 million. As a condition of these loans and guarantees, the REA requires appellant to insert a clause in its contract with its members, in which appellant undertakes to review its rate at least once a year and to revise the rate, if necessary, to " 'produce revenues which shall be sufficient, but only sufficient * * * to meet the cost of the operation and maintenance,' purchased power, transmission, debt service and retirement and 'to provide for the establishment and maintenance of reasonable reserves' " (J.S. App. A-20). In addition, appellant must give at least 30 days' notice of a rate revision to its mem-

bers and to the REA, and " 'no such revision shall be effective unless approved in writing by the Administrator' of the REA" (*ibid.*).

2. On December 11, 1978, the Arkansas Public Service Commission (PSC) gave notice that it proposed to consider whether it had jurisdiction over appellant's rates and charges for electricity furnished to its member cooperatives (J.S. App. A-11). On January 8, 1979, appellant filed comments opposing PSC jurisdiction over its rates (*id.* at A-27 to A-28). Appellant asserted that it transfers power in and out of its system under interchange contracts with other utilities and that the energy it sells to its members "is transmitted from one state to another in interstate commerce through interconnections with the transmission systems" of AP & L, SWEPCO and SPA (*id.* at A-27). Appellant argued that the PSC could not exercise jurisdiction because "[t]he interstate transmission and sale of electricity at wholesale to local distribution cooperatives is not subject to state control of rates" (*id.* at A-27).

In an order dated November 2, 1979, the PSC concluded that appellant was subject to its jurisdiction under Ark. Stat. Ann. § 73-201 *et seq.* (Repl. 1979) and that the exercise of its ratemaking authority over appellant would not violate the Commerce Clause (J.S. App. A-11 to A-23). Noting that it would seek to regulate only appellant's transactions with its member cooperatives, the PSC asserted that while these transactions may be characterized as "wholesale," they are "essentially local" in nature and their regulation would have, at most, an "incidental" effect on interstate commerce (*id.* at A-22 to A-23).[1] In addition,

[1] The PSC noted that it "would not attempt to regulate the rate at which [appellant] purchases power in interstate com-

the PSC concluded that its assertion of jurisdiction over appellant would not conflict with federal statutes and regulations administered by the REA (*id.* at A-19 to A-20).

The Pulaski County Circuit Court set aside the order of the PSC, finding that appellant's sales of electricity to its member cooperatives "are wholesale sales in interstate commerce" and that the PSC was not granted jurisdiction under Arkansas law "to regulate the rate to be charged for those sales" (J.S. App. A-24).

The Supreme Court of Arkansas, by a divided vote, reversed the judgment of the circuit court (J.S. App. A-1 to A-11). The majority held (*id.* at A-2) that "the [PSC] had the authority by Arkansas statutes to exercise jurisdiction and * * * this authority is neither preempted by any federal law nor prohibited by the Commerce Clause of the United States Constitution."

The dissenters noted that while the PSC has never set out the "percentages of interstate versus intrastate power" that appellant sells to its members, "it is certain that interstate and intrastate power comes and goes by interstate transmission grids as [appellant] has very little transmission capability of its own" (J.S. App. A-9). On this basis, the dissenters expressed the belief that appellant is engaged in interstate commerce and that the PSC's exercise of jurisdiction over appellant's wholesale rates "has the potential of interfering with interstate commerce" (*id.* at A-7). The dissenters accordingly concluded

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merce and that rate, of course, must act as a base for the price at which it resells that power to its members" (J.S. App. A-22 n.5; see also *id.* at A-18).

that the Commerce Clause barred PSC regulation here.[2]

DISCUSSION

The question presented is whether the Constitution prohibits the states from regulating sales of electricity at wholesale in interstate commerce by REA-financed cooperatives. We believe that the Arkansas Supreme Court erred in its answer to that question. Accordingly, we submit that the question is substantial and that the Court should note probable jurisdiction.[3]

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[2] The dissenters pointed out that appellant's 17 member cooperatives are fully regulated by the PSC and cannot pass on any rate increases without the approval of the PSC (J.S. App. A-10).

[3] We note that appellee does not challenge the Court's appellate jurisdiction over this case. Under 28 U.S.C. 1257 (2), this Court has appellate jurisdiction to review a final judgment rendered by the highest court of a state in which a decision could be had "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity." The Court has held consistently that "a state statute is sustained within the meaning of § 1257(2) when a state court holds it applicable to a particular set of facts as against the contention that such application is invalid on federal grounds." *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 441 (1979). See, *e.g.*, *Cohen* v. *California*, 403 U.S. 15, 17-18 (1971); *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282, 288-290 (1921). In the proceedings below, appellants challenged the constitutionality of the Arkansas statutes governing the PSC's regulatory authority insofar as those statutes were sought to be applied by the PSC to assert jurisdiction over appellant's wholesale transactions. The Arkansas Supreme Court sustained the validity of the statutes as applied, and, accordingly, we believe that the Court has appellate jurisdiction here.

1. In addition to providing an affirmative grant of power to Congress "to legislate when it perceives that the national welfare is not furthered by the independent actions of the States" (*Kassel* v. *Consolidated Freightways Corp.*, 450 U.S. 662, 669 (1981) (plurality opinion)), the Commerce Clause is "a limitation upon state power even without congressional implementation." *Hunt* v. *Washington State Apple Advertising Commission*, 432 U.S. 333, 350 (1977). At the same time, however, it has long been recognized that, "in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it." *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 767 (1945). "'[I]n areas where activities of legitimate local concern overlap with the national interests expressed by the Commerce Clause—where local and national powers are concurrent—the Court in the absence of congressional guidance is called upon to make delicate adjustment of the conflicting state and federal claims * * *.'" *Raymond Motor Transportation, Inc.* v. *Rice*, 434 U.S. 429, 440 (1978), quoting *Great A & P Tea Co.* v. *Cottrell*, 424 U.S. 366, 371 (1976).

Both parties have approached this case as if "congressional guidance" were completely absent. Appellants argue, in reliance on *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), and *FPC* v. *Southern California Edison Co. ("Colton")*, 376 U.S. 205 (1964), that the Commerce Clause bars the PSC from regulating its wholesale sales of electricity in interstate commerce. The PSC counters that these two cases are distinguishable from

the instant case and that the crucial question is whether the transactions are essentially local in character. In our view, neither approach is adequate to resolve the question presented.

In *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, *supra*, this Court held that the Commerce Clause prohibits state regulation of wholesale sales of electric power in interstate commerce. In *Attleboro*, a Rhode Island company contracted to sell electric power to a Massachusetts company for resale to Massachusetts consumers. Rhode Island sought to increase the contract price to be paid by the Massachusetts company, in order to enable the Rhode Island company to lower its rates to Rhode Island consumers. This Court held, however, that while interstate sales of electric power directly to consumers is a local matter within the jurisdiction of the importing state, the Commerce Clause forbids a state from regulating an interstate sale, at wholesale, not to consumers, but to distributing companies for resale to consumers.

The Court reasoned that if Rhode Island "could place a direct burden upon the interstate business," in order to confer an indirect benefit upon its citizens, Massachusetts could impose a countervailing regulation in order to achieve a similar benefit for its citizens. 273 U.S. at 90. The Court concluded that "the paramount interest in the interstate business carried on between the two companies is not local to either State, but is essentially national in character. The rate is therefore not subject to regulation by either of the two States in the guise of protection to their respective local interests; but, if such regulation is required it can only be attained by the exercise of the power vested in Congress." *Ibid.* This Court recently reaffirmed the continued vitality of the *Attle-*

boro decision when it held, in *New England Power Co.* v. *New Hampshire*, No. 80-1208 (Feb. 24, 1982), that the Commerce Clause bars a state from prohibiting the exportation of hydroelectric energy produced within its borders.

The PSC contends (Motion to Dismiss at 8-9), however, that *Attleboro* is inapposite because, in its view, appellant's operations—unlike those in *Attleboro*—are essentially local in nature. To be sure, this case presents a situation one step removed from that in *Attleboro*. Here, the PSC has not sought to regulate appellant's purchases of electricity from its out-of-state suppliers, which are analogous to the purchases by the Massachusetts company from the Rhode Island company in *Attleboro*. Nevertheless, the wholesale sales by appellant to its member cooperatives are clearly "part of an interstate transmission." *Pennsylvania Gas Co.* v. *Public Service Commission of New York*, 252 U.S. 23, 30-31 (1920). Thus, the mere fact that the transactions that the PSC seeks to regulate involve sales to local distribution cooperatives within the state does not necessarily establish that state regulation of such transactions is permissible under the Commerce Clause. In our view, the critical inquiry is whether appellant's wholesale transactions in interstate commerce are purely local rather than national in scope. Since its decision in *Attleboro*, this Court consistently has recognized that the sale of power at wholesale in interstate commerce is national in character and that regulation of such transactions can be undertaken only by Congress. See, *e.g.*, *Northern Natural Gas Co.* v. *Kansas Corporation Commission*, 372 U.S. 84, 90-91 (1963). Moreover, as we now show, even apart from the *Attleboro* doctrine, the PSC's analysis is flawed because it ignores pertinent congressional guidance.

2. Soon after the decision in *Attleboro*, Congress acted to create a system of federal regulation of sales of electric power at wholesale in interstate commerce and to foster rural electrification through loans to cooperatives and associations of cooperatives supervised by a federal agency—thus occupying the field which this Court had said was open only to it.

a. "In 1935, Congress enacted Part II of the Federal Power Act, 16 U.S.C. (& Supp. IV) 824-824k, which delegated to the Federal Power Commission, now the Federal Energy Regulatory Commission, exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce, without regard to the source of production." *New England Power Co.* v. *New Hampshire*, *supra*, slip op. 8. As the Court explained in *United States* v. *Public Utilities Commission of California*, 345 U.S. 295, 311 (1953), "Part II is a direct result of *Attleboro*. They are to be read together. The latter left no power in the states to regulate licensees' sales for resale in interstate commerce, while the former established federal jurisdiction over such sales." See *FPC* v. *Southern California Edison Co.*, *supra*, 376 U.S. at 213-215.

In *FPC* v. *Southern California Edison Co.*, *supra*, the Court upheld the jurisdiction of the Federal Power Commission over the wholesale rates of a California electric utility that sold electricity only within that State. The PSC concedes (Motion to Dismiss at 9, 10) that *Colton* is "factually similar to the present case," but asserts that *Colton* is not controlling because it involved the statutory question of the scope of FPC jurisdiction under the Federal Power Act, rather than the constitutional question whether, in the absence of Federal Power Act jurisdiction, a state may regulate wholesale electric rates

in interstate commerce. It is true that federal regulation of wholesale electric transactions under the Federal Power Act has thus far been inapplicable to REA-financed electric generation and transmission cooperatives such as appellant. See *Dairyland Power Cooperative*, 37 F.P.C. 12 (1967); *Salt River Project* v. *FPC*, 391 F.2d 470 (D.C. Cir.), cert. denied, 393 U.S. 857 (1968). However, the fact that Congress has seen fit to regulate wholesale rates of public utilities in circumstances virtually identical to those of the REA-financed cooperative in this case strongly suggests that appellant's wholesale transactions which the PSC seeks to regulate are national, and not local, in character. By the same token, the fact that REA generation and transmission associations are not subject to federal rate regulation is as much the product of congressional choice as would be the opposite result.

b. Leaving the Federal Power Act to one side, the Rural Electrification Act, 7 U.S.C. (& Supp. IV) 901 *et seq.*, which was adopted in 1936, provides a different, but nonetheless comprehensive, scheme for developing and supervising instrumentalities—primarily cooperatives and associations of cooperatives—to provide affordable electric power to rural areas. As the Federal Power Commission explained in *Dairyland Power Cooperative, supra*, 37 F.P.C. at 18:

> Under the Rural Electrification Act, the Administrator has virtually absolute discretion and exercises extensive and rigid supervision and control over its cooperative borrowers. The cooperative's books and records must be kept in accordance with the REA Uniform System of Accounts. Appointments of its manager, counsel, and other key personnel are subject to approval by REA. It cannot merge or consolidate,

> or sell or encumber any of its property without REA approval. The government's mortgage lien attaches to each of its extensions, and it cannot build extensions except with additional REA financing, or with REA approval of other financing. Thus, it cannot grow without REA approval. All of its contracts, including those for the purchase and sale of electric energy, must be approved by REA, and by this means REA controls the rates the cooperative pays and the rates it charges. Moreover, the need to return to REA for additional loans as the cooperative grows provides another mechanism whereby REA exercises control.

Similarly, in *Salt River Project* v. *FPC*, *supra*, 391 F.2d at 473, the D.C. Circuit pointed out:

> * * * REA's concern is not only with providing high standards of electric service and guaranteeing its loan, but also with reducing the cost of service to the cooperative's consumers. * * * Though REA regulation and supervision of cooperatives are, in many respects, far more comprehensive than those which the Federal Power Commission exercises over investor-owned utilities, there are certain areas, such as rate-making, where the cooperatives enjoy a freer hand. But it is in these areas that, by their structural nature, the cooperatives are effectively self-regulating. They are completely owned and controlled by their consumer-members, and only consumers can become members. They are nonprofit. * * *

Although most of REA's borrowers are intrastate distributing cooperatives, as to which state authority over retail rates is undisputed, a number, like appellant, are generation and transmission associations formed by several cooperatives to generate, buy, and

sell electric power at wholesale in interstate commerce. As the D.C. Circuit explained in *Salt River Project* v. *FPC*, *supra*, the REA does not control the rates and rate structure of these generation and transmission associations as thoroughly or with the formality of the Federal Power Commission. Nevertheless, the REA does exercise a substantial and continuing control over the wholesale rates and rate structure of these cooperative associations. The terms and conditions of a loan to a generation and transmission association require the borrower's rates and rate structure to be aproved by the REA, not just at its inception, but throughout the term of the loan. And in passing on rate questions, the REA considers, not only the security thus afforded for payment of the loan, but also the suitability of the rates and structure to the Act's underlying purpose of facilitating the availability of cheap electric power in rural America. 7 U.S.C. 904; 7 C.F.R. 1700.1, 1700.5. *See Dairyland Power Cooperative*, *supra*, 37 F.P.C. at 18-20; *Salt River Project* v. *FPC*, *supra*. This system is informal; undoubtedly because of the close relationship between borrower and "banker," we are aware of no judicial proceedings in which the REA's authority to supervise rates and structure has been challenged or in which the REA has had to seek redress against a recalcitrant borrower. Nonetheless, the system exists. Even if the PSC is correct in its contention that further regulation is desirable, that choice plainly lies with Congress—which has considered it—rather than with an individual state such as Arkansas.

The spectre of state regulation poses a threat to the REA loan because of the possibility that the state may refuse to permit its cooperatives to pay a generation and transmission association the rates to which

they agreed and upon the security of which the loan was issued. Moreover, the policy behind the Rural Electrification Act is at stake. The REA was created because investor-owned utilities were not serving rural areas or, if they did so, insisted that each farmer or small community pay the particular costs engendered by his often considerable distance from the utilities' main lines. To combat this, the REA has always encouraged its borrowers to establish affordable rates for all of its subscribers. In this way, costs are shared in a manner which, over the long run, benefits all by the creation of a sound, extensive rural electric system. If the state were to insist on a restructuring of the generation and transmission association's rate structure, the policies of the Act would be undermined.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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Solicitor General

ELLIOTT SCHULDER
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Docket Sheet

NO. 81-731-ASX	TITLE	Arkansas Electric Cooperative Corporation, Appellant v. Arkansas Public Service Commission

DOCKETED	COURT
Oct. 14, 1981	Supreme Court of Arkansas

DATE	PROCEEDINGS AND ORDERS
	Counsel for Appellant: Robert D. Cabe
	Counsel for Appellee: Robert H. Wood, Jr.
Oct. 14, 1981	Statement as to jurisdiction filed. (Record filed).
Nov. 16, 1981	Motion to dismiss filed.
Nov. 18, 1981	DISTRIBUTED. 12-4
Mar. 2, 1982	REDISTRIBUTED. 3-5.
March 8, 1982	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
June 1, 1982	Brief, amicus curiae, for the U. S. filed.
June 1, 1982	DISTRIBUTED. 6-17.
June 21, 1982	Probable jurisdiction NOTED.

July 20, 1982	Order extending time to file the appellant's brief on the merits until Aug. 23, 1982.
Aug. 6, 1982	Joint appendix filed.
Aug. 23, 1982	Brief amicus curiae, for the National Rural Electric Cooperative Association in support of the Arkansas Electric Cooperative Corporation filed.
Aug. 23, 1982	Brief for the appellant AR Electric Cooperative Corp. filed.
Sept. 22, 1982	Brief, amicus curiae, for The National Association of Regulatory Utility Commissioners in support of appellee filed.
Sept. 23, 1982	Brief for the appellee filed.
Nov. 5, 1982	CIRCULATED.
Jan. 17, 1983	ARGUED.